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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 222.

WILLIAM MOORE and J. S. McFERREN, Partners, doing business under the firm name of MOORE & McFERREN,

Appellants,

vs.

R. J. McGUIRE, E. H. WOODS, M. Y. SCOTT, M. M. SCOTT, E. M. SCOTT, W. A. YERGER, W. H. FITZGERALD, HUBERT WILSON and C. L. JONES,

Appellees.

Appeal from the Circuit Court of the United States, for the Eastern District of Arkansas.

BRIEF FOR APPELLEES.

ALEXANDER Y. SCOTT,
For Appellees.

J. M. MOORE,
CHAS. SCOTT,
E. H. WOODS,
Of Counsel.

GUNTHORP-WARREN PRINTING CO., CHICAGO.

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Supreme Court of the United States.

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WILLIAM MOORE and J. S. McFERREN, Partners, doing business under the firm name of MOORE & McFERREN, *Appellants,* vs. R. J. McGUIRE, E. H. WOODS, M. Y. SCOTT, M. M. SCOTT, E. M. SCOTT, W. A. YERGER, W. H. FITZGERALD, HUBERT WILSON and C. L. JONES, *Appellees.*	Appeal from the Circuit Court of the United States, for the Eastern District of Arkansas.

BRIEF AND ARGUMENT FOR THE APPELLEES.

(Reference to Record Marginal Pages.)

GENERAL STATEMENT OF THE CASE.

Island 76 is situated in the Mississippi River and is now attached to the main shore of Mississippi and is an island only during high water. It was platted and sectionized in 1830 as a part of the State of Mississippi, being described as follows, to-wit:

Lots one, two, three, four, five, six, seven and eight of section thirty-six and lots one, two and three of section thirty-seven in Township twenty-one North, Range eight West, in Boliver County and State of Mississippi. (Facing p. 366.)

And subsequently and in 1846 said island was platted and sectionized as a part of Arkansas under the following description:

Fractional Sections thirty-five and thirty-six, Township eleven south of the base line, Range one east of the 5th principal meridian and fractional sections one and two in Township twelve south of the base line, Range one east of the 5th principal meridian. (Facing p. 172.)

Known under different names, the island has been in existence as long as we have any records and extending as far back as 1765.

The appellants claim title through tax deeds to their immediate grantor from the State of Arkansas under the description as sectionized in 1846 as above stated, and the appellees acquired their title through tax deeds from the State of Mississippi under the description of the island as sectionized and platted in 1830, as above stated; both of the said states claiming jurisdiction over the island.

The appellees, after purchasing the island, took possession thereof and upon the forcible entry of the appellants, brought their suit of Unlawful Entry and Detainer, as the action is termed in Mississippi, in the courts of Bolivar County in the said state last mentioned, which suit was removed to the Federal

Court at Vicksburg by the appellants. The appellees herein likewise brought replevin for certain timber and saw-logs, when the sheriff of Bolivar County took possession and charge of same under the writ. Whereupon and after the institution of both of the said suits of the appellees herein, the said appellants herein filed the Original Bill in this case in the court below, among other things, praying an injunction staying the proceedings at law and the appointment of a receiver and alleging that the property was and is within the jurisdiction of the State of Arkansas and not within the jurisdiction of the State of Mississippi and praying that their title to said property be quieted.

The answer of the respondents below and the appellees here fully meet the issues of the bill and deny that the appellants are entitled to any relief in the premises.

THE FINDINGS OF THE COURT BELOW.

(p. 150 *et seq.*)

First.

"The western boundary line of the State of Mississippi is the middle of the main channel of the Mississippi River."

Second.

"The finding of the court is that in 1836 as well as in 1817 and long before that time Island 76 was East of the middle of the main channel of the Mississippi River and for this reason a part of the state of Mississippi and not within the boundaries of the state of Arkansas as defined by the act of admission of that state." (p. 163.)

Third.

"Upon the facts found by the court in this case there was no such acquiescence on the part of Mississippi, nor exercise of sovereignty by the state of Arkansas for such length of time as would warrant the court in holding that the state had lost its territory." (p. 182.)

STATEMENT OF LEGAL POINTS.

First.

The finding of the master, or the court below on the facts will not be disturbed unless the Appellate Court is clearly satisfied the finding is manifestly wrong.

Second.

Appellees understand that the Appellants contend as follows:

1. The Act of Congress of 1817 admitting Mississippi into the Union made the east bank of the Mississippi River the western boundary of said state, and hereunder

(a) Island 76 was never within the jurisdiction of Mississippi irrespective of where the channel of the Mississippi River may have been at said date.

2. The Act of Congress of 1836 admitting Arkansas into the Union made the middle of the Mississippi River the eastern boundary of said state, and hereunder

(a) That the main channel of the Mississippi River was east of Island 76 at the date of the admission of Arkansas into the Union, and hence the Island is within the territorial jurisdiction of that state.

3. That even though neither of the above positions are correct, that Arkansas has been in uninterrupted

possession of said Island for a great length of time and that Mississippi has acquiesced in said possession for so long a time that Arkansas now has title by usucapion and prescription.

4. That the act of the executive officers of the state of Mississippi in refunding the purchase money to Curry & Hull for said Island is an abandonment of the state's title to said Island, binding on the state of Mississippi by way of acquiescence.

5. That the Land Department at Washington having offered these lands for sale at Helena, Arkansas and sold them to certain individuals, patentees, under the Pelham Survey that said act was conclusive on the state of Mississippi and on the state of Arkansas as a settlement of their boundary.

6. That the United States government never having patented the lands to the state of Mississippi, but directly to individuals, Mississippi has no right to taxation.

To each of these positions, taking them in order, the appellees answer:

1. The Act of Congress admitting Mississippi into the Union made the middle channel of the Mississippi River the western boundary of the state of Mississippi, and hereunder,

(a) That in 1817, the date Mississippi was admitted into the Union, the main channel of the Mississippi River ran west of Island 76.

(b) That even in case the Court should hold the western boundary of Mississippi to be the eastern bank of the Mississippi River, the boundary of Mississippi would extend to the eastern bank of the main

channel of said river for navigation purposes and hence to the western bank of Island 76, including said Island within the territorial jurisdiction of Mississippi.

(c) That the jurisdiction of Mississippi once having attached, it remained fixed independent of any changes in the channel of said river from one side to the other of the island subsequent thereto.

2. The Respondents admit that the Act of Congress of 1836 admitting Arkansas into the Union fixed its eastern boundary as the middle of the main channel of the Mississippi River, meaning thereby the navigable channel of said river; but hereunder they assert,

(a) That the main channel of the Mississippi River in 1836 when the state of Arkansas was admitted into the Union was west of Island 76 and that said Island never became a part of the territory of Arkansas.

(b) That, independent of where the channel was in 1836, it was west of the island in 1817, which at the latter date became a part of Mississippi and remains under the territorial jurisdiction of said state until the present day.

3. Respondents deny that usucapion and prescription as generally asserted is a positive rule of International Law whereby one nation can acquire territoy of right belonging to another nation, but assert that said rule is merely a rule of evidence, aiding in the construction of treaties or the ascertainment of the true and ancient boundary, and hereunder,

(a) They deny that Arkansas under the Federal Constitution had the power to acquire and hold territory beyond the boundary defined by the act of congress, without the consent of Congress.

(b) That the claim of the doctrine of usucapion and prescription, cannot apply between two states, except where there has been a boundary commission of the states whose boundaries are to be affected by and with the consent of Congress or as an evidential aid of the true and ancient boundary.

(c) That Arkansas ever had such possession of Island 76 and exercised such jurisdiction over the territory of said Island as to warrant the invoking of the pretended doctrine of usucapion.

(d) That Mississippi ever abandoned or relinquished its possession so that the so-called doctrine of prescription could be invoked against her; but on the contrary, assert that she has held possession of said island from 1817 to the present date; and that Arkansas has not claimed possession for a sufficient length of time to obtain title under the pretended doctrine of usucapion and prescription.

4. They deny that the act of an executive officer, or officers within the state, can transfer title to property within the territorial jurisdiction of the nation or state or change or affect the boundary of said state.

5. They deny that the Land Department of the United States can change the boundaries between two states by the mere ministerial act of offering the land for sale, erroneously as within one or the other of the states.

6. They deny that the sovereign right of taxation belonging to a state is defeated by the Federal Government patenting land within its territorial jurisdiction to a citizen of the state or of a foreign state.

GENERAL STATEMENT OF THE FACTS.

A general outline or statement of the case having been made in the foregoing, including a statement of the legal points involved, it will be well here to place more fully before the Court the evidence and facts adduced at the hearing below and upon which the learned Judge predicated his findings of fact.

The first and most important fact to be determined is where the channel of the Mississippi River ran with respect to Island 76 in 1817, the date Mississippi was admitted into the Union.

The evidence adduced to this point by the appellants here,—the complainant below—consisted of oral testimony of living witnesses and also certain maps of the territory adjacent to the Island 76.

The living witnesses are Capt. Marshall J. Miller who testifies that he is seventy-eight years old (p. 184), a pilot and commander on the Mississippi River. Commenced running on the river in 1839. At that time the channel was on the Mississippi side. He thinks it changed in 1860 or 1865. Asked a leading question (page 186), says it changed from the Arkansas side to the Mississippi side in the early eighties. He learned to be a pilot under his father and brothers. He has been doing nothing for the last three years. Had La Grippe for over nine years and not able to go on with his work. (pp. 188 and 190.)

> "Q. State whether or not they (his father and brothers) represented to you where the channel

of the Mississippi River was in 1812 and from the time you commenced? Was it on the Mississippi side?

"A. On the Mississippi side. One of the first wood yards established on the Mississippi River was just above Island 76, on the Mississippi side —one of the first wood yards that was built. The plantations were opened by wood yards selling wood to steamers."

* * * * *

"Q. And your father and brother represented to you that the channel of the Mississippi River was on the Mississippi side at that time and during that period?

"A. Yes, and gave me where the channel ran from the time he commenced steam-boating.

* * * * *

"Q. Had there ever been a change in the channel?

"A. No sir, not in his memory and not in my brother's memory."

I quote this particularly, since this testimony is the sole and only statement in the record the complainants depend upon to overcome the positive testimony hereinafter mentioned as to where the channel at Island 76 was prior to 1839.

Capt. Thos. Wilcox (pp. 190-191), master and pilot, age 72. Has known Island 76 since 1847. Channel on the Mississippi side. Changed in 1882 to the Arkansas side.

Capt. A. E. Drinkwater (p. 196), master and pilot, age 62. Known channel since 1855. Channel on Mississippi side, changed in 1882 to the Arkansas side.

Mrs. L. M. Burrus (p. 303), 79 years old. Lived near Island 76. Knew the channel as far back as 1841. Was on the Mississippi side.

John C. Burrus (p. 306), age 53, knew the Island 76 in 1851. Channel on the Mississippi side.

J. Pindall (p. 249), age 60 years, known Island since 1862. Channel on the Mississippi side.

Geo. Malone pp. 252-3-4), pilot, age 69 years, known Island 76 since 1840. Channel on the Mississippi side, channel changed about 1882.

R. J. Mathews (p. 236), coal dealer, age 68 years, first knew Island 76 in 1857, channel on the Mississippi side.

The foregoing depositions constitute all the oral testimony introduced by the complainant touching where the channel at Island 76 was and the earliest date testified of is 1839—excepting alone the statement of Capt. Miller relative to his father and brothers' statement to him when a boy.

The complainant further introduces the following maps and plats:

1. Map of William Pelham, sectionizing Island 76 as part of Fractional Sections 35 and 36 in Township 11, Range 1 East of the Fifth principal meridian. This map bears the date of Dec. 23, 1846, and, survey was made in February, 1846. The map shows at that date the surveyor who sectionized the island considered it a part of Arkansas, though the arrow and the words Mississippi River indicate that the river ran between the island and the main shore and yet the field notes of this survey indicate that the channel at this date, 1846, was east of Island 76. (p. ...)

2. The next map introduced by the complainants is

a part plat of Township 21, Range 8, West Choctaw District. (Facing pp. 286-7.) This map is signed by Joe Dunbar, Surveyor of Public Lands south of Tennessee and is dated at Washington, Miss., May 31st, 1830. The plat contains only 35 sections and shows Island 76 unsectionized and contains the words "Mississippi River" and the arrow between the mainland and the island.

> NOTE.—It is important to note here that this map contains the following in writing on its face: "Surveying the boundary lines, all the sectional lines, connections with front sections, traverse of both sides Bolivar lake and traverse of the Mississippi charged by B. Griffin No. 3, 1832. *also traverse and retraverse of Island 76.*"—(followed by undeciphered words.)

This statement is important in considering this map with complete map of Township 21 North, Range 8 West, Choctaw District, to be referred to hereafter.

3. Map facing p. 301, being exhibit A to Le Vasseurs deposition, showing Island 76 practically joined to the main land of Mississippi at the present time.

The above depositions and maps are all that the complainants introduce to show where the channel of the Mississippi was in 1817, the date at which Mississippi was admitted into the Union. It is here that the Appellees take up the question and carry the proof back from 1839, the last date of the memory of any witness, and establish the channel absolutely by surveys and maps to have been west of Island 76 from

Appellees introduce map facing pages 446-447, 1821 continuously until after 1830.
entitled: Reconnaisance Mississippi & Ohio Rivers.

This map is properly certified to be a true copy of the original on file in the office of the Chief Engineer of the United States and contains the following certificate:

> "This reconnaisance of the Mississippi and Ohio Rivers was made during the months of October, November and December, 1821, by Capt. H. Young, Capt. W. G. Poussin of the Topog. Eng's and Lieut. S. Tuttle of Engrs. under the direction of the Board of Engineers. *The soundings of the bars were made during the months of October and November and it is believed that they are accurate for the lowest stage of water in common years. In very dry seasons the lowest stage of the water would be about* 10 *inches lower.*"

The next map introduced by the appellees consists of the fractional sections of Townships 11 and 12 South of the base line Range 1 East of the 5th Principal Meridian, which is to be found facing page 278. The map is attached as exhibit "A" to the deposition of Wm. McAndrews and on it appears the following certificate:

> "Surveyors Office, St. Louis, Jan. 22, 1829. The above plat of fractional Townships 11 and 12 South Range 1 East of the 5th Principal Meridian is conformable to the field notes thereof on file in this office.—Wm. McRee, Surveyor, etc."

And the caption shows that the survey was made *in February, 1827*, by Daniel Miller under contract of December, 1826.

3. The next map filed by the appellees is a map of facing page 366 and the map shows the plat of Township 21, Range 8 west, showing Island 76 sectionized as Sections 36 and 37 of said Township and Range.

[NOTE.—The plat filed in the record facing page 366 is not a correct copy of the plat actually filed and used by the court below, or actually introduced into evidence. That such is the case is shown by the following questions and answers in the deposition of E. H. Nall, at pp. 33 and 334, beginning with—

Interrogatory 11. "Please state whether or not, Mr. Nall, you have on record in your office the official copy of map of Township 21, Range 8 west, projected from the said field notes of Benjamin Griffin, deputy-surveyor, certified copy of which you have filed above to your deposition as Exhibit 'B' ".

A. "I have said map on file."

Interrogatory 12. "Please file with your deposition, as Exhibit 'C' thereto, a certified copy of the map."

A. "I file same as Exhibit 'C.' "

And also from the following questions propounded to Mr. W. J. Shackelford, at p. 390:

Interrogatory 9. "State whether or not you made any independent tracing of Island 76 from the field notes handed you and of the bank line of the mainland in Township 21, Range 8, and state what you ascertained relative to the accuracy of the map filed as Exhibit 'C,' attached to Mr. Nall's deposition."

A. "I made an independent plat from the notes and a traverse of the island from the notes, and not a tracing, and after comparing it with the map itself, found them to agree."

Interrogatory 11. "You should then say that the map marked Exhibit 'C,' and attached to Mr. E. H. Nall's deposition, was taken and platted from the field notes of Township 21, Range 8, which consists of the whole of Exhibit 'B,' attached to Mr. Nall's deposition."

And then the following, p. 392:

Interrogatory 18. "I ask you to file the map of Township 21, Range 8 west to your deposition, marking same as Exhibit 'B.' "

A. "Yes, sir; I did."

And also it appears from the deposition of Wm. McAndrews, p. 404:

Interrogatory 33. "I hand you, Mr. McAndrews, a map of Township 21, Range 8 west, Choctaw District of Mississippi, marked Exhibit 'C,' to the deposition in this case of Mr. E. H. Nall. Please examine same and scale the distance between Island 77 (a typographical error for 76) and the main shore of Mississippi."

Also see opinion of the court, p. —.

The matter is immaterial, except that the map is not identified as the exhibit to Mr. Nall's deposition, but it is clearly a copy of the map actually attached and identified as Exhibit "C" to Mr. Nall's deposition, and is in every respect identical with the map attached to Mr. Nall's deposition, with one exception; that is to say, that at the northern part of the Island 76, where the letters are "N. 40^5, E. 29° and N. 51°, W. 26°," there was a line drawn from a point scaling 26 chains from the north line of Township 21, Range 8 west, which is the south line of Township 22, Range 8 west, and the river bank across on the variations of the compass and chaining the distance of 29 chains to the head of Island 76. I will say that at the trial there seemed to have been a copy like this one filed herein, and also there was introduced the original copy used in taking the depositions, and identified by Mr. Nall and by each of the witnesses who testified with regard to this matter.

The above and foregoing is stated that the court may understand why the map facing p. 366 does not contain the letterings noted in the depositions. The scaling referred to by the witness not being made from the map in question, but being made from the actual tracing attached to Mr. Nall's deposition; but as stated above, the scaling, it is believed, will be identical on the map introduced here.]

Attached to the deposition of Mr. E. H. Nall are the field notes of Township 21, Range 8 West filed as exhibit "B" thereto, being divided into two parts, one 17 F" (at page 345) and "8 B" (at page 341), and it will be noted that Island 76 was first surveyed as a part of Township 22, Range 8 West, instead of Township 21, Range 8 West. (See p. 341.)

This last survey of Island 76 was made in October, 1830.

The foregoing and the three plats, including the field notes of Township 21, Range 8 West, show the channel from the year 1821 to 1830 with great accuracy and clearness.

The first plat is that opposite p. 446 and being the "Reconnaissance of the Mississippi and Ohio Rivers," and contains three sheets. The first sheet contains a table of conventional signs divided into colors, dots, etc., showing with great care and particularity, the following points: "Islands with growth of heavy timber, Islands with growth of willows, dry sand bars, rocks out of water, rocks under water, snags, etc., line of the channel, line of shallow water," and contains also a scale of miles for the length and a scale of miles for the width of the map.

Island 76, designated as Chapeau Island, is on the second page of the map,. said island being identified by the deposition of Mr. Andrews (p. ....), and by Mr. Shackelford as being the second island below the mouth of the Arkansas River and the first island below Ozark. Referring now to the table of conventional signs and to this map, we find that it is distinctly shown that in October, November and December, 1821,

at the lowest stage of the water in common years, the channel of the Mississippi River is designated at that date as west of Island 76. We further find that at the east of the island, that is between the island and the Mississippi shore and projecting northeast at the head of the island, almost touching the Mississippi shore is a dry sand bar and if we place the scale on this map we find that the part of the sand bar out of water, or the dry sand bar at this date came very close, indeed, to the Mississippi bank line, leaving a width not sufficient for the current, or channel of the Mississippi River by any possible means to have passed at that date, and in addition to this, we find the line of shallow water extending out considerable distance towards the main shore of Mississippi. The map in question, therefore, conclusively settles the fact that in *1821 the main channel of the Mississippi River ran west of Island 76.*

The next map is the survey of 1827, bearing date of Jan. 22, 1829, facing page 278, when fractional Townships 11 and 12 South Range 1 East of the 5th Principal Meridian was sectionized and an examination of this plat shows conclusively that at that date the Mississippi River ran west of Island 76. That is to say it shows careful triangulations of the Mississippi River at various points reaching from the main shore of Arkansas to Island 76 at three different points and touching the main shore of Mississippi above and below the island. The plat further shows a careful sectionizing of the main shore and it is particularly clear that at this date—the date of this plat—and of the survey of 1827, that the channel of the Mississippi River was west of Island 76.

The foregoing plat was made by the surveyor of Arkansas and is an Arkansas Map.

The next plat is the plat facing p. 366 about which comment has been made hereinabove, being the map filed as exhibit "C" to Mr. Nall's deposition. After an examination of the findings of the Court, page 158, we find that the map actually filed contains the indorsement: "The whole of this Township was surveyed by Benj. Griffin, Deputy-Surveyor, in January and February of 1830. Surveyors Office, Washington, Miss., May. 31st, 1830. Examined and approved—Joseph Dunbar, Surveyor South of Tennessee," and we also find from the same opinion, p. 159, that a copy of this map was filed in the Department at Washington in October, 1836, as shown by the letter of Hon. Thos. A. Hendrix, Commissioner of the Land Office in 1859. (p. 171.)

This map shows that in 1830, Island 76 was platted as a part of Township 21, Range 8 West, Choctaw District of Mississippi and is section 36 and 37 and the field notes filed at p. 341 show that the island was first sectionized, or intended to be sectionized as section 6 and 7 of Township 22, Range 8 West, but when the platting came to be done, it was found that Island 76 was opposite Township 21, Range 8 West and hence was platted as a part of said Township.

This explains the map of Township 21, Range 8 West facing p. 286 and in connection with the words written thereon: "Also traverse and re-traverse of Island 76." It is distinct that the plat facing p. 286 is not the complete plat of Township 21, Range 8 West.

Mr. W. J. Shackelford, a competent surveyor, platted from the field notes of Township 21, Range 8, as shown in his deposition a separate and distinct plat and found the plat filed as exhibit "C" to Mr. Nall's deposition to be in all respects in conformity with the field notes of said Township and he further found that the narrowest point between Island 76 and the Mississippi shore was 528 feet. (p. 391.) Thus, then it is distinct that in 1830 the island was platted as a part of the state of Mississippi and that the surveyors who made the survey then considered the island as a part of Mississippi, and in addition to this the distance across from the island to the main shore of Mississippi at the narrowest point did not exceed 528 feet and as shown by the deposition of Capt. Wilcox and Capt. West and others it is impossible that the channel of the Mississippi River could be confined within such a space. Thus, then it is conclusively established by record testimony of unimpeachable and unimpeached character, by measurements made by careful surveyors, actually on the ground, that the channel of the Mississippi River from 1821 to 1830 was west of Island 76 and therefore that Island 76 was a part of the territory of the state of Mississippi.

Corroborative of this testimony is the letter of Mr. A. Downing (end of p. 115). This letter is dated Jan. 18, 1859, and states that

> "I have for over thirty years been traveling up and down the Mississippi River. Island 76 was surveyed, I think in 30 or 31 as a part of Township 21, Range 8 West. At that time and for some time after, the Island chute, as it was called, was quite narrow. I think that about opposite the middle of the island, the chute was not over 100

yards wide. I have been told that deer had been and could be easily shot from the east shore of the river on the island, and *upon my own observation* I have no doubt they could, for at that time I had never heard of a steam-boat going up or down on the east side of the island. The main river then passed on the west side of the island. I think it yas in 1835, I spent some time on Township 21, Range 8 West, examining land in that township. The east bank of the river opposite the island has not fallen in much. The island chute at that time was quite narrow."

Mr. Dowing was formerly surveyor-general of Mississippi. Counsel have attempted to throw considerable doubt upon this letter and claim it is of no strength as evidence and is hearsay testimony, but this letter is a part of the official records at Washington, sent by the Governor of Mississippi to the Department with regard to Island 76 and can hardly be considered hearsay testimony and if admissible it is of great force and strength because it tells the personal observations of Mr. Downing and corroborates the maps filed herein absolutely and shows conclusively that the maps themselves are correct on their face and this letter further establishes the fact that the channel remained west of the Island 76 as late as 1835.

Counsel's comment on the Reconnaissance Map facing p. 446 as not being an accurate map, indicating that not sufficient time was given to the making of this map, but in filing the map attached as exhibit "A" to Le Vasseur's deposition, facing p. 301, they have given corroborative evidence of the correctness of this map for an examination of same will show about the same formation is now extending out to the head of Island

76 joining on to the main shore as then extended, and shows the contour of the island when cut into by the current to be about the same at the date this map was first made as when the map of 1821 was made.

We then have as against this mass of record testimony and the corroborative letter of Maj. Downing the bare statement of Capt. Marshall Miller of what his brother and father told him when a very young boy and in view of the time that had interversed and the feebleness, due not so much probably to advanced age, as to illness, or to both, of the Captain, it is quite possible that he misunderstood the statement of his father and brother. But even if not, that statement would be of little value as compared with the above evidence in the record.

I therefore submit that the finding of the Court below that the channel of the Mississippi River ran west of the Island 76 in 1817, the date of the admission of Mississippi in to the Union, and in 1836, the date of the admission of Arkansas into the Union, is sustained by the overwhelming facts in the record.

The other facts in the case will be stated in their proper place in the brief.

BRIEF ON LEGAL POINTS.

First.

The finding of the Master, or the Court below, on the facts, will not be disturbed unless the Appellate Court is clearly satisfied the finding is manfestly wrong.

The proposition is so well settled in this Court, and various State Courts, that no citations are necessary.

Second.

Stating the legal points in order, and giving the Appellees' reply to the Appellants contention, as stated above, we have—

First.

The Act of Congress admitting Mississippi into the Union made the middle of the main channel of the Mississippi river the western boundary of the State of Mississippi.

The Act admitting Mississippi into the Union and defining its boundaries, uses the words—

> "Thence west along the said degree of lattitude to the Mississippi river, thence up the same to the beginning."
>
> Hutchinson's Mississippi Code page 59, quoting Act of Congress of March 1, 1817.

The respondents—appellants—claim by these words

Congress intended to fix the western boundary of the Mississippi river. It is unnecessary, in view of the opin- of the Court, to more than refer the Court to the various treaties and acts giving an outline of the history and legislation affecting Mississippi territory as a Territory and as a State.

See—

Treaty of February 10, 1763, between Spain, France and Great Britain, fixing the boundary between Great Brittain and France as the middle of the Mississippi river.

Treaty of 1783 between Great Britain and America whereby Great Britain acknowledged the independence of America and designated the middle of the Mississippi river as its western boundary.

Act of Congress 1798 establishing the Mississippi territory, which Act is as follows:

> "All that tract of country bounded on the west by the Mississippi, on the north by a line to be drawn due east from the mouth of the Yasous to the Chatahouchee river, on the east by the river Chatahouchee, and on the south by the 31 degree of north lattitude, shall be and is hereby constituted one district to be called the Mississippi Territory."
>
> Hutchinson's Code, page 54.

Act of Congress of March 27, 1804, concerning the grants of lands and the sale of lands in the territory, paragraph 7:

> "The tract of country lying north of the Mississippi territory and south of the State of Tennessee and bounded on the east by the State of

Georgia and on the west by Louisiana, shall be and the same is hereby annexed and made a part of the Mississippi territory."

Hutchinson's Mississippi Code, page 58.

Treaty between France and the United States of 1803 whereby France ceded Louisiana to the United States by a general designation of the territory by name, which of course embraced all that had previously been a part of Louisiana including the western half of the Mississippi river.

Note: The Act of March 27, 1804, adding to the Mississippi territory that part south of Tennessee, north of the Mississippi territory, distinctly made the western boundary of said territory Louisiana, which boundary had been fixed by the Treaty of 1763 between Great Britain, Spain and France, as the middle of the Mississippi river. Bolivar County is included within the territory added to the former Mississippi territory by this Act of 1804, as Bolivar County is north of the mouth of the Yazoo river; therefore by this Act that part of Mississippi territory from the Tennessee line south to a line drawn from the mouth of the Yazoo to the Mississippi is bounded, in so many words, by the middle of the Mississippi river on the west, and does not leave any room for interpretation whatever, *the actual words* designating the boundary.

Cession Act of Georgia of April 24, 1802, ceded to the United States "all right, title and interest, etc., to the land situated within the boundaries of the United States south of Tennessee, and west, etc."

Hutchinson's Mississippi Code, pages 55-56.

Said cession being made for the purpose of forming a state, as follows:

> "That the territory thus ceded shall form a state and be admitted as such into the Union as soon, etc., * * * and the United States accepts the cession above mentioned and on the conditions therein expressed."
>
> 5th paragraph of Hutchinson's Code, page 57.

Resolution of Congress of June 27, 1812, seeking consent of Georgia to form two states of the Mississipi territory.

Hutchinson's Code, page 58.

Act of Admission of Mississippi, March 1, 1817.

Hutchinson's Code, page 59.

Bolivar County Boundary defined 1836.

Hutchinson's Code, page 88.

Line between Bolivar and Coahoma counties and Bolivar's western boundary defined February 9, 1839, in which the following words are used:

> "Thence down the main channel of said Mississippi to the south boundary of Bolivar county."
>
> Hutchinson's Code, page 89.

Act of the Mississippi Legislature of February 27, 1856, defining the limits and divisions of the State of Mississippi.

Mississippi Code of 1857, page 47.

Constitution of Mississippi of 1868, Article II adopting the boundary lines of Mississippi as then established by law.

Mississippi Code of 1880.

Constitution of Mississippi of 1890, Article II, Sections 3 and 4, and Act of the Legislature
(Annotated Code of Mississippi 1892)

defining the limits of the State and counties.
Annotated Code Miss. 1892.
Morgan v. *Reading*, 3 Smeades & M., 366.

In *Handly* v. *Anthony* the Supreme Court of the United States used the following language:

"When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream."

Handly v. *Anthony*, 5 Wheat., U. S., 374.
Quoted with approval in *Indiana* v. *Kentcuky*, 136 U. S., 479.

See—Commenting on the Kentucky Boundary,
Missouri v. *Kentucky*, 11 Wal., U. S., 395.

"It is a rule of construction of deeds * * * between private individuals that the grant carries as far as the grantor owns."

(See Gould on Waters, Sec. Ed., par. 195.)

The same rule applied to the Congressional Act of 1817 would necessarily extend the jurisdiction of Mississippi to the middle of the stream.

"The term 'river' as employed to designate a boundary by the land owners whose title extends *usque ad filium acquae*, to the use of the water, means in law the center of the stream."

Gould, parag. 196, *St. Louis* v. *Rutz*, 138 U. S., 226.

This rule applies to a grant from the Crown, a State, or the United States, to navigable as well as unnavigable fresh streams, where the soil of fresh water rivers is held to be private property.

Gould, Waters, 196, and case cited. Note, 2, 3, 4; and see in this connection *Morgan* v. *Read, Supr.*

"Where a navigable river forms the boundary of co-terminal states, the middle of the thalweg (navigable channel) is generally admitted as the line of their separation, the presumption being that the right of navigation is common to both."

Creasy on International Law, parag. 230, page 21.

On this subject Vattel lays down the rule that when a nation takes possession of a country bounded by a river she is considered as appropriating to herself the river; but of two nations inhabiting the opposite banks of the river neither party can prove that they themselves, or those whose rights they inherit, were the first settlers in those tracts. It is to be supposed that both nations came there at the same time, since neither of them can give good reason for claiming preference; and in this case the dominion of each extends to the middle of the river.

Vattel Law of Nations, parag. 120, quot.
5 Wheat., 374, 3 Mass., 147.

Where a boundary follows a river it is not proven that either of the riparian states possess a good title to the whole bed; their territories are separated by a line running down the middle, except where the stream

is navigable, in which case the center of the deepest channel, and it is usually called the thalweg.

Hall, International Law, 104.
Glenn International Law 756.
Wheat. International Law.

It has seemed to us that the argument in the Mississippi Code of 1857 is conclusive as to this question, but the above citations will simply add to verify that opinion which was rendered by Chief Justice Sharkey, Judge Harris, and one other, whose name I now forget. Than Judge Sharkey no abler man has ever presided over a State court. The foregoing, in connection with the Act of the Legislature of 1804 bounding that part of Mississippi territory including Bolivar County and Island 76 by Louisiana, is absalutely conclusive of the question that the western boundary of Mississippi is the middle of the main channel of the Mississippi river.

a. In 1817, the date Mississippi was admitted into the Union, the main channel of the Mississippi river ran west of Island 76.

The proof in this case relative to the whereabouts of the channel divides itself into two classes:

(1) That by deposition, including hearsay evidence

(2) Official surveys and maps of the river and the contiguous states of Arkansas and Mississippi.

The Complainants establish by the preponderance of evidence that the channel of the Mississippi river was west of Island 76 from the present date back to 1881; from that date, or some times prior thereto, back to 1839, about September of that year, was east of Island 76; and at this last mentioned date the testimony of the

Complainants stops, except for the hearsay evidence of Captain Marshall Miller, who states in his deposition that his father and brother told him the main channel had always been east of Island 76, and had never changed from 1812. This statement of Captain Miller as to his father and brothers' statements is the sole evidence in the record, even a[illegible]inting at the channel being east of the Island at any date prior to 1839. The father and brother were in the flat-boating business.—

The comment of the United States Supreme Court, in the case of *Missouri* v. *Kentucky, Supr.*, is particularly applicable, even had these two men sworn to their own depositions, and to the facts stated therein; and particularly so when it is merely the hearsay recollection of what another has said with regard to his opinion of where the channel might have been.

Says the Supreme Court:

> "Only three men knew the river prior to 1820, and they were engaged in the business of flat-boating, which is hardly ever undertaken in a low stage of water. There is nothing to show that any one of them ever made a personal examination of the channels and the surrounding objects at this point, and there is a remarkable absence of fact to sustain their opinions."

We have no information from Capt. Miller at what stages of the water his father and brother passed up and down the river; how often during a given year, and how long they were in passing any particular point; and their statement is indeed of very little value. The fact of the matter is the age of Captain Miller, influenced by his recent illness, to which he testifies, is

probably responsible for the statement, because it is not in consonance with the absolute facts established by the evidence.

As against this hearsay testimony of Capt. Miller, the statement of Mr. Downing is more than conclusive, giving as it does not only his personal experience when in 1835 he visited the point in question, but giving the reputation in the community and stating the physical facts such as the width of the channel and the fact that he had never known of a steamboat to pass up and down on the east of the Island; of deer being shot from the main shore in Mississippi to the Island bank. All of these facts carrying the internal evidence of the correctness of Mr. Downing's statement. But apart from this hearsay evidence, which at least may be said to balance each other, prior to 1839 there is absolutely no proof whatever of where the channel of the Mississippi river was excepting alone the three official maps introduced by the Defendants, being the Reconnaissance Map of the Mississippi river of 1821, actually sounding the channel; the Arkansas map of 1829 of a survey made in 1827 failing to sectionize Island 76 as a part of Arkansas; and the Mississippi Map of 1830, sectionizing the Island as a part of the State of Mississippi;--all agreeing, in all of their essential details, and absolutely placing the channel of the Mississippi river west of Island 76 from 1821 to 1830.

These maps were made by men actually on the ground,--the engineers of the United States, for the purpose of ascertaining the greatest depths of water for vessels in time of war; the surveyors of the United States, for the purpose of ascertaining and section-

izing the land within the jurisdiction of Mississippi and Arkansas; and, it is not in consonance with fact that the three would all have made identically the same mistake with regard to the channel. Indeed, in 1830 actual measurement across the chute by the surveyors who sectionized Township 21 Range 8 West of Bolivar county, Mississippi, gives the distance between the mainland and the Island as not over 528 feet. This, it must be remembered, is from bank to bank of the Island, without regard to any sand bars that may have existed in between, which in turn corroborates the statement of Mr. Downing that the chute about the middle of the Island was little over 100 yeards wide.

I respectfully submit that it is unquestionably proven beyond a shadow of a doubt that the main channel of the Mississippi river was west of Island 76 in 1817. For a more particular discussion of the testimony and of the maps corroborated by Mr. LeVassuer's map of 1881 and 1889, see *supra.*

(*b*) *Even in case the Court should hold the western boundary of Mississippi to be the eastern bank of the Mississippi river, the boundary would extend to the eastern bank of the main channel of said river for purposes of navigation and hence to the western bank of Island 76 including said Island within the territorial jurisdiction of the State of Mississippi.*

This necessarily follows: If the river is the boundary, certainly the commonwealth of the State of Mississippi and the inhabitants thereof were to have the right of navigation up and down the river. It must necessarily be presumed that Congress legislated with this intent. At that date water transporation was

practically the entire transportation, and it cannot be presumed that some chute from the river that might be full at high water mark was to be the boundary of the State. Certainly, the most that the Complainants can claim is that the boundary of Mississippi did not extend beyond the law water mark. At low water mark the river or channel bank would be the Island's western bank, and hence within the territory of the State of Mississippi.

Handly v. *Anthony, Supr.*

I do not extend the argument because I deem it settled that the middle of the main channel of the river is the boundary of Mississippi, but simply refer to the above to show that even if such is not the case and the contention of the Complainants is admitted, still on that contention and of necessity, the Island was within the territory of Mississippi at that date.

(c) *The jurisdiction of Mississippi once having attached, it remained fixed independent of any changes in the channel of the Mississippi river from one side to the other of said Island subsequent thereto.*

This is settled by the Supreme Court of the United States in the cases of

Missouri v. *Kentucky, Supra,* and
Indiana v. *Kentucky, Supra.*

In case this was not the law, and the boundary followed the shiftings of the navigable channel of the river, this case would be settled immediately, as it is now an admitted fact that the main channel of the river is west of Island 76 and that said Island is attached to the main shore of Mississippi.

2. *The Appellees admit that the Act of Congress of* 1836 *admitting Arkansas into the Union fixed its eastern boundary as the middle of the main channel of the Mississippi river, meaning thereby the navigable channel of said river, but hereunder they assert.*

(a) *The main channel of the Mississippi river in* 1836 *when the State of Arkansas was admitted into the Union was west of Island* 76, *and that said Island never became a part of the territory of Arkansas.*

The above propositions are allegations of fact and depending upon evidence which clearly establishes that the channel was west of the Island at said date. Certainly the Complainants do not establish it east of the Island earlier than '39; and the channel having been fixed west of the Island in 1821, it is presumed, under the law of continuance to remain until the contrary is shown. Indeed, carrying this out, we have the statement of Mr. Downing that in '33 the Mississippi channel was very narrow, having fallen in very little since 1830, when it was only a little over 100 yards wide.

(*b*) *That independent of where the channel was in* 1836, *it was west west of the Island in* 1817. *Said Island at the latter date became a part of Mississippi, and has remained under the territorial jurisdiction of said State until the present day.*

For an elucidation of this proposition, see the discussion as to the facts, *Supra.*

It also refers to the case of

Missouri v. *Kentucky, Supra,* and
Indiana v. *Kentucky, Supra.*

3. *Respondents deny that usucaption and prescription as generally asserted is a positive rule of international law, whereby one nation can acquire territory of right belonging to another;* but assert that said rule is merely a rule of evidence aiding in the construction of treaties or the ascertainment of the true and ancient boundary.

In an examination of the above proposition I have made an exhaustive research into the authorities on international law, covering the statement made by the majority of text writers, that a nation may acquire property by usucaption and prescription, in an attempt to find whether there was such a rule in force between nations taking the effect of a positive rule of international law; and if so to find what constituted its limitations and the rules governing its application.

The more modern publicists seem to assume the existence of a positive rule of international law; that usucaption and prescription is one of the means of acquiring property by a nation; and we find Wheaton stating:

> "Independently of these sources of title (referring to Conquest, Treaty and Discovery) the general consent of mankind has established the principle that long and uninterrupted possession by one nation excludes the claim of every other. Whether this general consent be considered as an implied contract, or as a positive law, all nations are frequently bound by it; since all are parties to it; since none can safely disregard it without impuning its own title to its possessions; and since it is founded upon mutual utility and tends to promote the general welfare of mankind."
>
> Wheat. International Law, pages 304-5.

It would seem from the paragraph in the above quotation—"Since none can safely disregard it without mipuning its own title to its possession, etc.," that Wheaton refers to immemorial prescription, of which we will speak hereafter. Reading this in connection with

> "The exclusive right of every independent state to its territory and other property is founded upon title originally acquired by occupancy, conquest or cession, and subsequently confirmed by assumption arising from the lapse of time or by treaty or other compacts with foreign states."
>
> Wheaton International Law, page 303.

When we find that he states that writers have questioned whether perscription applies between nation and nation, and further find nothing more on the subject—nothing by which we can find any rule to apply the so-called principle of prescription—we naturally wonder whether any such principle of international law exists; and if so, what are its limits.

Glenn, Hall and Lawrence are equally vague on the subject, a few pages at most being devoted to a discussion of it, and nothing whatever given by which we can discover any rules to apply the principle to any state of facts existing in any particular case. Mr. Dudley Field, in his proposed International code suggests a period of fifty years for a prescription; but this is a suggestion only, and has no effect or force as law; nor has any length of time been ever set whereby usucaption would take effect.

Falling back to the writers on the subject through Vattel, Creasy, Von Marten, Kluber, Phillmore, Puf-

fendorf, Crotius, and others, we are free to say that after a very careful analysis of the subject, we deny the existence of any such rule of international law as prescription in the sense of time and possession giving title short of *immemorial prescription.*

In the beginning of the examination we find ourselves enmeshed in a maze of metaphysical discussion chiefly of an academic nature, seeking to ascertain what should be the law of nations rather than a statement of what is the law of nations. In order to extricate ourselves from this maze of philosophical inquiry, it becomes necessary to begin at the beginning so far as we are able and follow the matter to a conclusion, when I believe we will find the true rule as it exists today and always has existed. For this purpose we need not go into a discussion of the right of private property in land—a right which does not exist, according to such philosophers as Henry George and Spencer; and even Vattel says:

> "Nature has not herself established a private property over any of Her gifts, and particularly over land; and She only approves of its establishment for the advantage of the human race."

Whatever may be meant by that we do not know; nor does he give any proof that Nature approves any such appropriation. Personally, the writer holds with Henry George, that there can be no private property in land, but that it is the gift of Nature to all mankind.

But though much has been written and much sought to be proved from nature and the law of nature, we are not to consider the philosophy of a principle of positive municipal law, but to examine whether any such prin-

ciple exists as a positive rule of international law. * * * The Romans were the first who sought to establish any positive title to land by reason of possession for a time. This doctrine of private law had its origin in the Twelve Tables, and was designated usucaption and prescription; and under the Twelve Tables possession and use of movables for one year, and of immovables for two years worked an usucaption. Vattel defines usucaption as,

> "The acquisition of domain founded on a long possession, uninterrupted and undisturbed,"

that is to say, an acquisition solely proved by its possession; and quotes Wollf's definition:

> "An acquisition of domain on a presumed desertion,"

of which he says,

> "His (Wolff's) definition explains the manner in which a long and peaceable possession may serve to establish the acquisition of domain."
>
> Vattel, Law of Nations, 186.

In Mr. Poste's edition of Gaius, usucaption is defined as,

> "The acquisition of the right by prescription on the part of the acquirer by his strictly defined possession during a certain number of years."
>
> Poste's Gaius, page 161.
>
> "Prescription in the Roman law deprived the owner of his right of action, while usucaption transferred the ownership to the possessor."

This seems to be the real distinction between usucaption and prescription.

Poste's Gaius, page 581.

> "Usucaption, signifying the proprietary title which was acquired by long possession in cases

where the possessor honestly believed himself to be the lawful owner, although he could not prove his legal title."

Creasy on International Law, 249.

Puffendorf in his Law of Nature and Nations, states:

"It belongs to our present design to inquire likewise concerning that method of acquisition by which he who hath gotten possession of what was really another's by a just title and with honest intentions, and hath also held it for a considerable time without being disturbed or opposed, obtains the full property of the thing thus possessed, so as to extinguish all the rights and legal claims of the former owner. This the Roman law terms usucaption, because the thing is, as it were, taken and confirmed by long use or possession. * * * The word prescription in the sense of the same letter imports strictly that plea, demurrer or exception, by which the person thus in possession invalidates the claim of the first proprietor,"

and he further defines prescription as,

"The acquisition of a property by means of long possession continued to the term of years fixed by the law."

Puffendorf, page 439.

"Prescription is the exclusion of all pretentions to a right; an exclusion founded on the length of time during which that right has been neglected,"

"Or, according to Wolff's definition,

'It is the loss of an inherent right by value of a presumed consent.' "

Vattel Law of Nations, page 186.

"It would seem that in the beginning title by usucaption necessitated *bona fides* in the original of the title, while prescription did not; but Jus-

tinian, under the influence probably of the Canon law made the *bona fides* in the case of prescription also necessary, and fixed the term of years for usucaption and prescription to run at thirty years, and the Canon law afterwards improved on the civil law, requiring a perpetual good intention."

Puffendorf, Chapter 12, para. 3, Mr. Barbeyrac's Code, 582.

The Roman law variously fixed different dates when usucaption would give title, differing in cases of movable and immovable property; beginning with the Twelve Tables fixing one and two years, and finally settling under the law of Justinian at a term of thirty years. Thus these rules of private law were in the nature of statutes of limitations, whereby a right of action was barred after a certain time. These rules, of course, applied to that class of property subject to usucaption. It is important to note here that certain classes of property were not under the civil law subject to be acquired by usucaption, and time had no effect upon title.

This is especially to be noted here, as it will play an important part in the discussion that is to follow.

"Among these are Public Places, Things that belong to the Public, What is Due to the Treasurer, and the Princes' Demesnes."

Puffendorf, Book 4, page 440, Mr. Barbeyrac's Code.

Just as now Statutes of Limitations do not run against the State.

It is well also to note here that the civil law rule of usucaption and prescription is different from pre-

scription as we know it at common law, for the only limitation to prescription at common law is the time when the memory of man runneth not to the contrary; the time of legal memory being fixed at Rich., 1 (1189). And also, prescription at common law applies only to incorporeal hereditaments; no title could be acquired of land; and corporeal substances by prescription, because more certain evidence may be had.

Blackstone's Commentaries, page 265.

Thus, the rule of usucaption and prescription in private civil law being understood, the reasons given for such rules are well known and fixed rules, which various authors have attempted to trace the to the law of nature, which seem founded on reason and justice deducted from the assumed premise of the right or private ownership in property.

The question, however, is not the origin of usucaption, nor the justifiability of its enforcement as affecting private law—a question now largely historical and academic, due to our statutes of limitations; but is a question of public law affecting the rights of sovereign states, and as such involves matters materially different, for as between nations there is no general law-making power governing their relations. But international law is the outgrowth of treaties and compacts between nations, which for its enforcement is based rather upon their consent than upon any positive rule of conduct, crystalized into a law.

Also, it is well to bear in mind in this examination: We are not discussing what should be the law of nations when they by mutual consent establish a parliament of men—a federation of the world to regulate

the relations existing between them: But what is the recognized rule of law now existing and in force between nations. Whether a nation can acquire property by prescription has been a matter of dispute among the learned for many generations,—a discussion of more interest from an academic standpoint than from any practical purpose it may serve until such time as the international court, so devoutly to be wished, is established.

The authors which I have examined seem in the main to content themselves with discussing whether such a law derived from the law of nature best comports with the peace and welfare of mankind, prevents wars, and settles conflicts, and would enure to the greatest happiness of the human race. So it is that Bentham, than whom a greater man never discussed these subjects, prepares a plan for the perpetual peace of mankind; and other philosophers dreamed their dreams and joined the great majority; and yet the boom of the cannon is still heard, the clash of the sabre smites the air, and men suffer and die in the endless conflict of nations.

Amongst the great minds who discussed this question is Hugo Grotius. In his great work, "The Rights of War and Peace, including the Law of Nature and of Nations," he attempts for the first time to collate the laws of nations, and reduce them to some positive rule. It is asserted by text writers that Grotius holds that prescription and usucaption is a law of nations. In the translation I have examined he does not take such positive ground, but gives illustrations in which time and possession have been used as an *argument* against the claim of another nation.

In Chapter 4 at page 290 of Campbell's edition of 1814, he undertakes to discuss title by Occupancy, Possession and Prescription. Of this chapter it is necessary for me to state that Mr. Campbell failed to translate the whole chapter, stating that "the translator proceeds from the 4th to the 9th chapter of the second book of the original, the intermediate chapters being chiefly a repetition of the author's former arguments respecting the rights of seas and rivers and other kinds of dominion, and that relating to the rights of persons being so fully treated in the first volume of Judge Blackstone's Commentaries, it seems unnecessary to give them in the present work." It is unfortunate that the translator saw fit not to give here the entire work since Grotius is quoted by Puffendorf, Phillimore and others, as holding that prescription gives the right of title to property to nations.

At paragraph 1 of the chapter he says:

> "A great difficulty arises here respecting the right to property by uninterrupted possession for a certain time, for though time is the great agent by whose motions all the legal concerns and rights may be measured and determined, yet it has no actual power of itself to create an express title to any property. Now, those rights were introduced by the civil law, and it is not their long continuance but the express provisions of the municipal law gives them their validity. They are of no force, therefore in the opinion of Vasquez (Contro. C. Illustr. Lib. to C. 51 N. 18) between two independent nations or sovereigns, or between a free nation and a sovereign, between a sovereign and an individual who is not his subject, or between two subjects belonging to different kings or nations. Which, indeed, is true, and is actually the case, for such points relating to

> persons and things are not left to the law of nature but are settled by the respective laws of each country. As the unqualified admission of this principle would lead to great inconvenience and prevent disputes of kings and nations respecting the points of territory from ever being adjudged, in order to eradicate the seeds of perpetual warfare and *confusion, so repugnant to the interests and feelings of every people, the settlement of such boundaries is not left to the claim of prescriptive right, but the territories of each contending party are in general expressly defined by certain treaties.*"

Now here is a clear statement of Grotius quoting Vasquez with approval:

> "Which indeed seems true, and is actually the case, for such points relating to persons and things are not left to the law of nature, but are settled by the *respective laws of each country.*"

And in the paragraph which follows, he distinctly disapproves applying prescription between nations. He then proceeds to argue the question, and quotes two instances, as follows:

> "And the Lacedaemonians, we are informed by Isocrates, laid it down for a certain rule admitted among all nations that the right to public territory as well as to private property was so firmly established by length of time that it could not be disturbed, and upon this ground they rejected the claim of those who demanded the restoration of Messena." (Pages 295-6.)

He further states:

> "Sulpitius, speaking against Antiochus proved how unjust it was in him to pretend, that because the Greek nations in Asia had once been under the subjection of his forefathers, he had a right to revive those claims and to reduce them again to a state of servitude and upon this subject, two his-

torians, Tacitus and Diodorus, may be referred to, the former of whom calls such obsolete pretentions 'empty talk' and the latter treats them as 'idle tales and fables.' With these opinions Cicero in his second book of offices agrees, asking, what justice there can be in depriving an owner of the land which he has for many ages quietly possessed."

Grotius then continues and bases the right to property by prescription upon the presumed abandonment of the owner by reason of his failure to exercise any right over the same or to make any claim therefor for so great a while; and while the argument seems inferentially to apply to nations, he does not particularly say so. Upon questions of length of time he gives no direct point, but at page 309 states—

"Now, as time immemorial considered in a moral light seems to have no bounds, silence for such a length of time appears sufficient to establish the presumption that all claim to a thing is abandoned, unless the strongest proof to the contrary can be produced. The most able lawyers have properly observed that time, according to the memory of man is along a hundred years, though probably it may not fall far short of that space, for an hundred years is a term beyond which human existence seldom reaches; and a space which in general completes three ages or generations of men. The Romans made this objection to Antiochus, that he claimed cities which neither he, himself, his father nor his grandfather had ever possessed. (Page 309.)

"Perhaps it may be said that this matter does not rest upon presumption only, but that it is a rule introduced by the law of nations that uninterrupted possession against which no claim has been asserted will naturally transfer such property to the actual possessor. For it is most likely that all nations by consent get their sanction to

such a practice as conduces to their common peace. The term 'uninterrupted possession,' therefore, has been very properly used to signify as Sulpitius says in Lib. 'that which has been held by one uniform color of right without intermission,' or, as the same author in another place calls it, '*perpetual possession that has never been called in question.*' For a transitory possession creates no title, and it was this exception which the Numidians urged against the Carthaginians, alleging that as opportunity offered sometimes the kings of the Numidians had appropriated to themselves the disputed possessions which had always remained in the hands of the stronger party." Page 318.

Thus it would seem that if Grotius meant to state that prescription was a law of nations, he meant to refer to immemorial prescription, though he indicates that a time not far short of an hundred years might be sufficient. At the end of the chapter is to be found the following:

"It is an inquiry of importance whether the law of usucaption and prescription, if it prevailed in a prince's dominions, can be applied to the tenure of the Crown and all its prerogatives. Many legal writers who have treated of the nature of sovereign power according to the principles of the Roman civil law seem to affirm that it may be so applied. *But this is an opinion to which we cannot accede in its full extent, for to make a law binding upon any one, it is requisite that the legislators should possess full power.*" * * * "*It certainly is not to be compared with other things; it so far surpasses them in nobleness of its aim, and the dignity of its nature; nor is any civil law to be found which either does, or designs to comprehend sovereign power within the rules of prescription.*"

It might be well to ask how prescription can run

against a nation in the case of another nation, and not in the case of an individual; and as Grotius rules that prescription is not based upon the law of nature, holding with Vasquez, but upon a positive rule of legislation, how it could apply between parties for whom there is no parliament to legislate, and no tribunal to enforce its decree, is beyond the mind of man to comprehend.

The next thing that we have to consider, is Puffendorf, and we find after discussing usucaption and prescription as a rule of the civil law, he attempts to extend it to international law by inference. Thus he says at page 448:

> "From hence it appears that though two were subject to no common law besides that of nature and of nations, may allege against each other's claim a long uninterrupted and honestly obtained possession, and so much the rather as public possessions cannot be disturbed without much greater confusion and danger than private, though it must be confessed that in controversies between princes and states it is frequently not altogether unnecessary to appeal to prescription, since the right of the possessor may, or at least should, *be deduced more solidly from the foundations.* * * * Thus likewise Soliman, the great Turk would often often say that he had a right to the city of Rome, as being the lawful successor of Constantine, who had removed the imperial city to Bizantium; yet in the most noble examples upon record you will find that besides *the argument of long continued possession, some title or other capable of producing a sovereignty has been at the same time alleged.* Thus Isocrates under the person of Arcadius, showing in the first place that the Lacedaemonians became masters of Messena by the title of just war, afterwards brings in the length

of possession as a kind of secondary and inferior proof."

Puffendorf, 44i-9.

Thus we see that thus far neither Grotius nor Puffendorf assert that prescription is a law of nations, but inquire into the matter of whether it should be or not. In fact, Grotius doubts the advisability of adopting it, and Puffendorf asserts that there should be a juster title than time, and in fact, that in one instance at least time is used only as a sort of secondary proof to some other claim of title. In fact, possession for a great length of time seems to be understood by Grotius and Puffendorf to be merely used as *an argument to substantiate a right otherwise, or on other grounds asserted.*

Phillimore discusses the subject of prescription, and seems to be one of the first to lay down as a positive rule that prescription applies between nations; and yet when we refer to what he says, we cannot but have grave doubts as to whether or not he means *immemorial prescription, and does not refer to any particular time short of immemorial prescription giving title.* He states in volume 1, page 361 of his International Law:

"It is true that some later writers on the law of nations have denied that the doctrine of prescription has any place in the system of international law, but their opinion is overwhelmed by authority at variance with practice and usage and with the reason of the thing." He quotes Grotius, Heineccius, Wolff, Mably, Vattel, Rutherforth, Wheaton and Burke.

"The practice of nations, it is not denied, proceeds upon the presumption of prescription, when-

> ever there is scope for the admission of that doctrine. * * * It is admitted, indeed, that immemorial prescription constitutes a good title to national possessions, but this is a perfectly nugatory admission, if, as it is sometimes explained, it means only that a state which has acquired originally by a bad title may keep possession of its acquisition as against a state which has no better title. * * * It is perhaps the difficulty attending the application to nations of this technical part of the doctrine which has induced certain writers to deny it altogether, but incorrectly, for whatever the necessary lapse of time may be, there unquestionably is a lapse of time after which one state is entitled to exclude the other party. In other words, there is an international prescription, whether it be called 'immemorial prescription' or by some other name."
>
> Pages 362-3, Phillimore's Int. Law, Vol. 1, 3rd Ed., 1879.

And further he says:

> "The period of time as has been repeatedly stated, cannot be fixed by international law between nations, as it may be by private law between individuals; it must depend upon varying circumstances; but in all cases these proofs would be required." (Page 367.)

Thus, while Phillimore holds that prescription is a rule of international law, what he seems really to mean, though he denies that is the case, is that immemorial prescription upon which all of the nations of Europe really claim their title, because when he asserts there is no time fixed by which property belonging to one nation would accrue to another, the only time in the nature of things that can accede, is that time when the other nation can make no proof of its title. There is no tribunal before which a nation can be brought to

bar in such an instance, and no rules to be enforced by such a tribunal. It would depend in each case upon the consent of the nations whether the question of boundary would be referred, and upon what terms, and unless the using nation consented to prescription running against it, certainly there would be no rule of prescription, and, on the other hand, no nation would consent where possession had been long continued to refer the matter to any tribunal for decision.

Vattel likewise holds prescription a rule of international law, or seems to hold so, but in reality, what Vattel says is that it should be recognized as international law. He begins his argument on the subject to show that usucaption and prescription is derived from the law of nature, as follows:

> "Nature has not herself established a private property over any of her gifts, and particulaly over land; she only approves of this establishment for the advantage of the human race. On this ground then it would seem absurd to suppose that after the introduction of domain and property the law of nature can secure to the proprietor any right capable of introducing disorder into human society." (Page 187.)

Proceeding from these two on proven premises, he argues to his own satisfaction and establishes in his own mind that usucaption in private law is based upon the law of nature; and in truth and in fact, we know its origin to be in the Twelve Tables of the Roman law. He then states at page 190:

> "After having shown that usucaption and prescription are founded in the law of nature, it is easy to prove that they are equally a part of the law of nations and *ought* to take place between

different states; for the law of nations is but the law of nature applied to nations in a manner suitable to the parties concerned."

And he then adds:

"As to *immemorial* prescription, what we have said respecting it is sufficient to convince every one that it *ought necessarily to take place between nations.* Nay, more, as by virtue of that law of nations in all doubtful cases supposed to stand on a footing of equal right in treating with each other, prescription when founded on long undisputed possession ought to have its full effect between nations without admitting any allegation of the possession being unjust, *unless the evidence to prove it is very clear and convincing indeed; for without such evidence every nation is to be considered as a bona fide possessor.*"

"Since prescription is subject to so many difficulties, it would be very proper that adjoining nations should by treaty adopt some rule on this subject, particularly with respect to the number of years required to found the lawful prescription, since the latter point cannot in general be determined by the law of nature alone."

These last quotations conclusively show that prescription has no bearing in the law of nations as an actual existing rule of action; that Mr. Vattel was really urging the establishing of such a doctrine between nations comporting as he believes with the law of nature. Phillimore in quoting Vattel seems to assume that he holds such a position, and it probably comes from that paragraph in his work in which he says "prescription of many years standing as well as usucaption is then established by the voluntary law of nations"—a statement really at variance with all the rest of his argument. Creasy and the other

writers above mentioned, and some others, seem to hold to the same opinion.

Before discussing the contrary view and the view which I shall establish beyond a question of a doubt to be the law between nations, not from the comments of text writers or academic discussions of publicists, but from actual custom or practice of nations in their boundary disputes and the decisions of their commissions, I deem it expedient to here state what I consider to be the cause of the attempt to ingraft into the law of nations prescription, and why it remains an attempt only and must so remain for a great while to come. Before beginning this, however, it is worthy to note that with the exception of one or two instances cited by Grotius, in which Cicero argues against the injustice of disturbing a possession of ages, and some other *nation* urges that it is unjust to disturb a possession of some three generations, there is not in all of the text writers a single concrete instance given of any action between any nations whereby the rule of prescription has been put in force. They refer to no boundary commission, to no contest between them adjudicated by any boundary court, in which the question of prescription was used and was *decided to be a law of nations.* They refer to no treaty whereby separate nations agreed to the enforcement of such a rule of law; basing their whole contention upon usucaption and prescription in the private law thus arguing that it proceeds or is in accordance with the law of nature, and thus arguing that because it is in accordance with this supposed law of nature and supposedly best comports with the welfare of mankind

it should be adopted as a law of nations. But nowhere do they show that in practice it has been so adopted.

Returning to the question of the origin of this contention of prescription as applicable to nations, we must be reminded that Rome dominated the world with her legions, and her laws were scattered over the face of the then known globe; and when Christianity became the great ruling force of Europe, its seat being in Rome, the laws of that nation permeated all of the other nations, and were adopted more or less by them as models upon which to base their system, thus effecting the Peace of Westphalia, which was really the beginning of our modern international system. It was found the title of all European nations to their territory depended upon immemorial possession except in certain instances ratified by treaty. Therefore, to justify their title it was attempted to base it on the doctrine of prescription adopted from the civil code. But the two had nothing in common since the possessor of anything invariably has title to it unless a superior title can be shown, and in the case of immemorial prescription no title superior to possession could be shown; but while in this sense *immemorial* prescription became a doctrine ingrafted into international law, it never extended beyond that for the simple reason that the time at which a prescription would run could not be designated.

First, then: There was no general legislative tribunal for all of the nations which could fixe a time. Second. There was no tribunal with power to enforce its decrees; and while publicists might say one

hundred years, as suggested by Grotius, or fifty years, as suggested by Field, should work a usucaption and prescription, the assertion remained only a suggestion, having no force of positive law.

Necessarily, the usucaption and prescription of the civil law failing for this reason, another idea was sought to be ingrafted by the side of this, which idea was designated as "acquiescence." But here they were met by the same trouble; what length of time should acquiescence run to give title. So likewise this fell to the ground. But as now the boundaries of nations had become fixed by treaty based upon immemorial possession, and any changes in their boundaries were effected by treaty of war or purchase, the doctrine of acquiescence became a force for one purpose,—admittedly for one purpose only, *and that is, as an aid to the interpretation of treaty.*

Premising this much, we now come to consider those writers who hold that there is no such thing as a nation acquiring property by usucaption and prescription, leaving out, of course, immemorial prescription. And first we must mention Vasquez, referred to by Grotius and quoted with approval, *supra.* The famous Father Dupuy, Counsel and Library Keeper to the King of France in a discourse entitled "Whether prescription is of force among sovereign princes" is another who denies the doctrine of prescription. Von Marten, Kluber Lampradi and Mamiama are others who hold like views. The only one of these authors whose work I can find is Von Martens, and from him I quote as follows:

(Von Martens Law of Nations, being the Science

of National Law, Covenants, Powers, etc., founded upon the Treaties and Customs of Modern Nations in Europe; and we find in Chapter 3 of Prescription, Sec. 1, on this subject the following questions are started, viz.:)

"Ought prescription to be considered as a particular sort of right among nations, and as a means of acquiring or losing a right? And does it make a part of the universal law of nations, and is it admitted as such by the powers of Europe?"

A nation may certainly renounce a property or right to possessions in undertaking actions to prove such renunciation and in losing its rights it may authorize another to acquire it; but the main object is to know whether abstaining from certain property or rights or whether keeping silence voluntarily and knowingly while another makes use of them can deprive a nation of such property and rights and authorize another to seize on them irrevocably. This is what we have in view when we examine whether prescription has any weight or not among independent nations, abstaining from the use of a right or keeping silence, while another makes use of it can never have the force of consent except we are obliged to speak of or make use of a right, and this obligation cannot exist among independent powers, according to the universal law of nations in its strict sense. As long as there is no acknowledgment, simple presumption, founded on silence or inaction cannot deprive us in spite of ourselves of our rights for the time to come. Prescription does not, then, constitute a natural right, and if the welfare or convenience of nations requires them to admit it, if it be presumed they have consented to it, still we are as far from the object as

ever, as long as the time required for losing or acquiring by prescription remains undermined, and as long as the universal law of nations cannot determine it with precision.

In the Code he states as follows:

> "If possession be immemorial, if there exist no possession anterior to it, it is undoubtedly sufficient to set aside all the pretentions of others. But this is not the effect of prescription founded on the duration of this possession; *it is the consequence of the natural impossibility for any other to prove a right better than that of the possessor.*"

In Sec. 2 he states:

> "Were prescription considered with respect to the positive law of nations; it is true the powers of Europe often urge the right of prescription; they seem *even to acknowledge the force of it in having recourse to declarations* in order to preserve their rights. However, first, these same powers often refuse to acknowledge it at other times. Second, sometimes they understand by prescription extinction of a right which has been decidedly renounced by actions which proved the consent. Third, Declarations are often employed as additional means of securing a right while the possessor would not, however, think of losing without this precaution. Fourth, Declarations are sometimes employed to hinder certain actions which a nation has been obliged to undertake from being looked upon as amounting to a tacit consent as inconvenient, whether general or particular, as no custom even has determined the time necessary to establish a right by prescription. Prescription, properly speaking, ought not to be considered as a source of the positive law of nations, at least among the sovereign states of Europe."

It is but natural to suppose that the other authors

mentionedf above as holding the same view as Professor Von Martens argue along like lines, and the force of Von Martens' conclusion is not so much based upon his argument as to whether or not prescription comports with the law of nature, as upon that part of his argument in which he states positive facts; that it has never been adopted as the universal law by the nations of Europe; that it is asserted sometimes, by one nation, and again denied by it, as best suits its purposes; but no time has been fixed and no tribunal established whereby the matter may be determined: It still remains not a positive law of nations, which, indeed, is a statement of a fact rather than an argument based upon theory.

There is one other matter which deserves mention here: it is, that Mr. Hosack, in his work on the rise and growth of the law of nations as established by general usage and treaty from the earliest time to the treaty of Utrech does not mention in the course of his entire work the question of usucaption and prescription; and it is reasonable to suppose that had there been any such doctrine to be derived from the custom and usage of nations that he would certainly have mentioned the subject.

In like manner Mr. Kent in his elaborate Commentary on International Law, makes no reference whatever to any principle of the law of nations whereby territory may be acquired or lost by usucaption or prescription.

These two authors seem to be dealing with international law as it is, irrespective of international law as it should be, deriving their law not from supposed

logical deductions from the law of nature or from metaphysical discussions, but from the treaties and usages of nations themselves; and the omission of these authors to include any such doctrine within their works, taken in conjunction with the fact that no one of the publicists who advocate the principle refer to any custom or treaty whereby the rule is enforced, we must necessarily conclude from a consideration of these matters alone that in the law of nations, prescriptions as a law of title short of immemorial prescription, does not exist. It will be well also to refer to a statement of Mr. Kent's, in which he says:

> "Puffendorf has always held the first rank, but his work, largely as it enters the principle of international law, is of very little practical value in teaching us what the law of nations is at this date. (Whatever merit it may have as a treatise on moral philosophy as an exponent of international law it has few or none.) To the same limbo of forgotten authors may be remitted the works of Wolff, Burlamaquis, Rutherforth."
>
> Kent's Com. Int. Law, page 735, Abdy's Edition.

Having thus considered the text writers and publicists on the subject, it becomes now important to examine some of the disputes upon boundary, to ascertain whether or not the rule of prescription is applied in actual practice as between nations. Unfortunately, I have been unable to get at all, or many of the boundary controversies. The Venezuelan dispute I have in part, but as it is largely without index, I am unable to find any controversy in that dispute whereby the question of prescription was raised. So much of the index of contents as is given does not re-

fer to any point of the kind. But I have been able to get the conclusions of three boundary disputes between the United States and Great Britain: One, the Behring Sea controversy; one the Passamoquoddy Bay controversy, and the other the Alaskan Boundary controversy.

> International Law Digest, Vol. 1, Mr. Upshur, Secretary of State to Mr. Everett, October 9, 1843, M. S. Instruction Great Britain, states

the law with regard to time to be as follows; and I believe the correspondence accrued out of the Oregon Boundary question:

> "Now, mere lapse of time independent of legislation or positive agreement cannot of itself either give or destroy title. It gives title only so far as it creates a presumption equivalent to proof that a title exists derived from higher sources; it destroys title only because it creates a like presumption that whatever the title may have been it has been transferred or abandoned. Thus: It merely creates evidence, and nothing more. It creates a presumption equivalent to full proof, but it differs from proof in this: that proof is conclusive and final, whereas presumption is conclusive only until it is met by greater proof or by a stronger counter-presumption."

In the proceedings of the Commission under Article IV of the Treaty of Ghent relating to the title to the islands in Passamaquoddy Bay, the agent of Great Britain concludes his argument as follows:

> "A total silence continued to be observed by the government of the United States with respect to all these islands now in question excepting * * * until the year 1807, notwithstanding the public notoriety of the facts of British settle-

ment and of the exercise of British jurisdiction over all the islands, Grand Manan, as well as those in Passamaquoddy Bay, with the above exceptions; and notwithstanding these facts were in evidence before the Commissioners of the two nations under the fifth article of the Treaty of 1794, as before mentioned * * * the simple uncontroverted fact that all these islands now in question upon the publication of the Treaty of 1874 were in the possession of his Majesty * * * with the tacit consent and acquiescence not only of the Government of the United States but of the State of Massachusetts * * * must to any unprejudiced mind more strongly evince the understanding of both nations at that time with regard to the title of that island under that treaty, and can be considered in no other light than as a mutual contemporary exposition of the true intent of the treaty in that regard. * * * To an unprejudiced mind also * * * the further uncontroverted fact that under this mutual understanding of the treaty, the United States as well as the State of Massachusetts in the words of the late agent of the United States before quoted, remained silent spectators of the settlements and improvements made by his Majesty's subjects upon these islands during a period of more than 23 years with regard to one of them, and more than 30 years with regard to all of the others, will justly furnish an argument that the United States have no claim at this date to any of those islands."

Page 129 of Mem. of Brit. Agent, date June 11, 1817, M. S. U. S. Copy in State Dep't in Washington.

In all this it is to be noticed that in this Passamaquoddy Bay controversy possession by acquiescence or prescription was not attempted to be used against

the United States, in any sense of prescription running against the United States, and barring title to the property; but the argument was that in view of the fact that the possession and settlements were made by the British prior to the time of the treaty, and at the time of the treaty, and even until after the treaty; that the possession was an argument to be used against the United States; with regard to its *understanding of the meaning of the treaty*, the treaty alone, and its proper construction being enough to govern the rights of the parties, independent of the question of time or possession.

Before going further into the Boundary Commissions and their determination upon these questions, it will be well first to examine some of the rulings of the Supreme Court of the United States, to ascertain whether or not that Court has ever applied the rule of prescription contended for by the text writers to international questions in the sense of time alone limiting the right of a nation; or, in other words, whether there is any such thing as a statute of limitations running against independent sovereignties.

While it may be that I have not examined all of Decisions of the United States Supreme Court bearing upon this question, it has been my intention to do so; but I have examined all of the cases that I understand have been cited by counsel opposed as authority for sustaining their contention that prescription is applicable between nations, and an understanding of these Decisions places them exactly in line with the view contended for herein: that is to say, there is no such thing as prescription operating between independent sovereignties.

The first case to be considered is that of

Rhode Island v. *Massachusetts,* reported in 4 How., at page 591,

and the syllabus of this case contains the following:

> "For the security of rights, whether of states or of individuals, long possession under a claim of title is protected, and there is no controversy in which this great principle may be invoked with greater justice and propriety than in the case of disputed boundaries."

Standing alone, the syllabus would be taken to mean probably that the court held that prescription would apply as between nations in cases of disputed boundaries; but an examination of the facts of the case and of the opinion itself, leaves this matter hardly a matter of doctrine, unless it is to apply to the case in controversy. In which event, indeed, it will then be found the limitation to be placed upon the rule is that contended for in the statement of the agent of Great Britain in the Passamaquoddy Bay controversy above referred to.

The facts in the case of

Rhode Island v. *Massachusetts,*

shortly stated, are about as follows:

There were grants to each of the States from the Government of Great Britain. Over 200 years had elapsed since the charter of Massachusetts was issued, and over 180 years since the Rhode Island charter. (Those years refer back from the date of the Decision in 1846.) In 1702 commissioners were appointed by the colonists of Massachusetts and Connecticut to settle the boundary between them, which accordingly was done by the commissioners in 1710.

Massachusetts and Rhode Island, by Act of their General Assemblies, appointed commissioners to determine this line, and the line was determined by them at that date. Again in 1716 and 1717 commissioners were appointed who in 1718 designated the boundary line between the Colonies, which boundary line was accepted by both Massachusetts and Rhode Island, by Act of their General Assemblies.

It is admitted that since that date Massachusetts has claimed and exercised jurisdiction over the land up to the line designated, and while some protests from time to time were made by Rhode Island nothing definite was done by her to offset the decision of these commissioners. In addition, it was very doubtful what construction should be placed upon the original grants, the State of Rhode Island claiming that a misconception had been placed upon the charter. With regard to this the Court says:

> "The misconstruction of the charter in going more than three miles south of Charles river is earnestly insisted on by complainants' counsel. If the words of the charter were clear and unequivocal in this respect there would be great force in this argument; it would be decisive of this controversy, unless controlled by other facts and circumstances in the case."

He then shows that the construction of the charter, or the beginning of it is doubtful, and with regard to that states the following:

> "It would therefore seem that the charter may be construed favorably to the Respondents; that the construction of the Complainant is not a forced one is admitted, and the conclusion naturally follows that men of equal intelligence may differ in opinion as to the true meaning of the instrument.

That Massachusetts more than two hundred years ago construed the charter as her counsel now construe it is clear, and the facts proved authorize the conclusion that the construction was not for many years opposed by Connecticut or Rhode Island and at no time by Plymouth." (Pages 633-634.)

Counsel further urge that a mistake had been made by the commissioners in settling a running line of 1711 and 1718, and the Court says:

"It may be a matter of doubt whether a mistake of recent occurrence committed by so high an agency in so responsible a duty could be corrected by a Court of Chancery; except on the clearest proof of the mistake, it is certain there could be no relief. No treaty has been held void on the ground of misapprehension of the facts by either or both of the parties." (Page 634.)

The Court further says:

"Fraud is not charged, and we have only to inquire into the alleged mistake. From the nature of this supposed mistake it is scarcely susceptible of proof." (Page 636.)

And goes on to show that the proof is not made showing the mistake, stating that if it occurred in the first boundary commission, it is hardly possible that it should have occurred in the second boundary commission. The Court then further says:

"This dispute is between two sovereign and independent states. It originated in the infancy of their history, when the question in contest was of little importance. Unfortunately steps were not early taken to settle it in a mode honorable and just and one most likely to lead to a satisfactory result. There is no objection to the joint commission in this case, as to their authority, capacity or the fairness of their proceeding a mistake is all

that is laid against their decision; and as has been shown, this mistake is not clearly established either in the construction of the charter or in the location of the Woodward and Saffery station. But if the mistake were admitted as broadly and fully as charged in the bill, could the Court give the relief asked by the Complainant." (Page 637.)

In 1754 William Murray, then attorney general, * * * was consulted by Connecticut whether the agreement with Massachusetts with regard to the boundary in 1713 would be set aside by a commission appointed by the Crown, to which Mr. Murray replied:

"I am of the opinion that in setting the above location (boundary) the Crown will not disturb the settlement of the two Provinces so long ago as 1713. I apprehend his Majesty will confirm their agreement, which of itself is not binding on the Crown, but neither Province should be suffered to litgate such an amiable compromise of doubtful boundaries. If the matter were open the same construction already made in the case of Merrimac River must be put upon the same words in the same charter applied to Charles River as to Jacks Brook. It is impossible to say whether it is a part of Charles River without an exact plan and knowing how it has been requted. (Pages 637-8.)

From the settlement referred to up to the time this opinion was given 41 years only had elapsed, and if that time was sufficient to protect that agreement, with how much greater force does the principle apply to the agreements under consideration, which are protected by the maps of more than a century and a quarter.

More than two centuries have passed since Massachusetts claimed and took possession of territory up to the line established by Woodward and Saffery. This position has ever since been

steadily maintained under an assertion of right. It would be difficult to disturb a claim thus sanctioned by time, however unfounded it might have been by its origin. The possession of the Respondent was taken not only under a claim of right, but that right is the most solemn that ever has been admitted by the Complainant and by the other Colonies interested in opposing it. Forty years elapsed before a mistake was alleged, and since such allegation was made, nearly a century has transpired. If in the agreement there was a departure from the strict construction of the charter, the commissioners of Rhode Island acted within their power, for they were authorized to agree and settle the line between the said Colonies in the best manner they can as near agreeable to the Royal Charter as in honor they can compromise the same.

Under this authority can the Complainant insist on setting aside the agreement, because the words of the charter were not strictly observed? It is not clear that the calls of the charter were deviated from by establishing the station of Woodward & Saffery, but if in this respect they so deviated, Rhode Island was not the last one, for those commissioners were authorized to compromise the dispute." (Page 638.)

The Court then follows this with a statement relied upon by the Complainants:

"Surely this, connected with the lapse of time, must remove all doubt as to the right of the Respondent under the agreement of 1711 and 1718." (Page 638.)

Thus, indeed, the ruling of the Court is entirely correct, because two sovereign states have a right by treaty to settle and determine disputed boundaries between themselves, and these settlements when made are as binding as the agreement between individuals;

and when in addition to the agreement it is ratified and approved by its General Assemblies, and it has been confirmed by lapse of time, the court will not go behind the agreement or attempt to investigate into its correctness; and especially is that the case when the original charter or conveyance that was to be settled is of a doubtful nature.

But this decision does not assert or maintain, and cannot be said to be authority for the proposition that time alone gives title.

The next Decision of the Supreme Court of the United States which might properly be considered as throwning some light upon this question is the case of

Missouri v. *Kentucky,* 11 Wall., 395.

This was a case involving the boundary between Kentucky and Missouri relative to the title to Wolff Island, located in the Mississippi River. Missouri claimed the ownership of the island as early as 1782 and exercised jurisdiction over it. Kentucky up to the time of the rendering of the Decision in 1817 and ever since it had been a State maintained jurisdiction over the island and possession thereof; it was embraced within her surveys in 1837, and the people therein paid taxes, exercised the elective franchise under her laws, and a resident of the island was elected to represent her in the General Assembly; and in 1828 her courts exercised jurisdiction over the island.

> "The jurisdiction fully established by acts such as these," says the Supreme Court, "has never been disturbed.

On the other hand, it states, that Missouri if it

claimed the island to be within her boundaries, has never attempted to subject the people to her laws, or to exercise jurisdiction therein. If there was proof, it states, that the island by legislation had been included in the limits of New Madrid County, then service of a writ on a solitary settler there by the sheriff would be an exercise of sovereign power on the part of the State; but in the absence of this proof there is nothing to connect the State with the transaction. Taking this statement, with the additional statement of the Court, there is nothing in this record which shows that Kentucky has not maintained for a long course of years possession and jurisdiction over the teritory and the people who inhabit it. (Page 403.)

It would seem that if prescription was a rule of international law, that it would have been brought to bear in this controversy. But instead of that, we find that the determination of the Court is not based upon the ground of time or of acquiescence, but that the Court seeks alone to ascertain where the Mississippi River ran at the date of the admission of Kentucky into the Union; and after ascertaining from the facts in the case that the river ran west of Wolff Island at that time it determines that Kentucky is entitled to the island.

This Decision, as we will see, is based entirely upon a determination of the facts as to where the channel was, and indeed the Court he says:

> "It follows, therefore, if Wolff Island in 1763 or in 1820 or at any intermediate period between these dates was east of this line, the jurisdiction of Kentucky might fully attach to it." (Page 404)

The next case of the Supreme Court relied upon by counsel for Complainant, and probably more so than any other, is the case of

Indiana v. *Kentucky,* 136 U. S., 479.

In this case an island in the Ohio River was in controversy, and the facts in the case show that Virginia had maintained possession of it and exercised jurisdiction during her ownership, and that after the formation of the State of Kentucky she continuously exercised jurisdiction over the property, taxing its inhabitants, serving her writs upon the island, legislating in regard thereto, and that there had been two decisions—one of the United States Supreme Court and several of the State of Kentucky holding the island within the jurisdiction of Kentucky at an early date; that the property had been surveyed as a part of the State of Kentucky, and that as early as 1806 a United States survey of Indiana had been made which did not include the island within the territorial limits of Indiana.

In addition to this the Bill of Indiana admitted that ever since its formation as a state the State of Kentucky had held possession of and exercised territorial jurisdiction over the island excluding the State of Indiana therefrom. On this state of facts the Court says:

> "The question then becomes one of fact: Did the waters of the Ohio pass between Green River Island and the mainland of Indiana when Kentucky became a state and her boundaries were established. * * * It is clear, we think, from the court testimony that at an early date after Kentucky became a State the channel between

the island and the mainland of Indiana was often filled with water the whole year and sometimes to the width of 200 yards; and that water passed through it of more or less depth the greater part of the year until down to a period subsequent to the admission of Indiana into the Union." (Page 506.)

The Court then comments and says:

"But above all the evidence, etc., there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. It was over seventy years after Indiana became a state before this suit was commenced, and during all this time she never asserted any claim by legal proceedings to the tract in question. * * * The long acquiescence and the exercise by Kentucky of dominion and a jurisdiction over the island is more potential than the recollection of all the witnesses produced on the other side. Such acquiescence, etc., can only be regarded as a *recognition of the right of Kentucky too plain to be overcome except by the clearest and most unquestioned proof.*"

It then goes on to say:

"Potential as are the considerations drawn from long silence and acquiescence of Indiana, her affirmative action is not the less persuasive in favor of Kentucky's claim.

It admits that in 1804 Congress authorized a survey into townships. * * * Under this Act a survey was made of the land in the vicinity of Green River Island in December, 1805; and in April, 1806; and it did not include the island in the territory north of the Ohio but treated the bank of the Bayou or channel north of the island as the bank of the river. The notes of this survey were given in evidence and show conclusively that the officers of the Government at that time did not consider the tract in controversy as form-

ing any part of the territory of Indiana, but did consider that the waters of the Ohio running north of it made the tract now in controversy an island of the river. This survey, from the time it was made, has been regarded as establishing the fact that the southern boundary of Indiana lies north of the island. (Page 512.)

In addition to this the State appointed commissioners to designate the location, and also the State of Kentucky did so; and these commissioners ran the line identically in accord with the survey of 1806."

In addition the Court says:

"We have spoken of the character of the testimony introduced on the part of Indiana, and of the fact that it does not touch upon the condition of the channel above the island previous to her admission as a state to the Union." (Page 517.)

"All the testimony is to be taken with many allowances for imperfect recollection from the confusion of many witnesses of what they saw with what they heard, or what they knew of their own knowledge with what they learned from the narrative of others. The clear and admitted facts we have mentioned, corroborated as they are by nearly everything of record to represent them, leave on our minds a much more satisfactory conclusion than anything derived from oral testimony before us."

And then proceeds to state:

"But such long acquiescence of Indiana and Kentucky, etc., forbids at this date, after a lapse of nearly one hundred years any disturbance of the State in her possession of the island and jurisdiction over it.

"*Our conclusion is that the waters of the Ohio river when Kentucky became a state flowed in a channel north of the tract known as Green River Island, etc.*" (Pages 518-519.)

Thus it will be seen that though the jurisdiction of Kentucky was established by constant acts on its part,—legislative, judiciary, and otherwise; and Indiana had acquiesced in such a jurisdiction for a period of over seventy years, the Court bases its opinion upon the fact of where the channel of the river was at the date of the admission of the State of Kentucky, and uses the argument of possession and acquiescence in connection with the other facts merely as a means of establishing *the fact of where the boundary actually was.*

Thus showing in this opinion that the rule of the Supreme Court is not that prescription gives title, but that long possession and acquiescence is evidence to be considered in connection with other facts, as to where the true boundary was.

The next Decision of the Supreme Court is that of

Virginia v. *Kentucky,*

and was likewise a case where the commissioners of each state in 1802-3 under the legislative approval and sanction ran a boundary line between these two states, which boundary line was admitted by both states, and which boundary line until about the year 1892 was acquiesced in by both states and jurisdiction exercised accordingly. The Court declines to set aside this boundary upon the ground that the State—quoting Judge Storey in *Poole* v. *Flueger,* 11 Pet., 185-209:

> "It is a part of the right of sovereignty belonging to independent nations to establish fixed disputed boundaries between their respective territories; and the boundaries, so fixed by compact between nations become conclusive upon all the subjects and citizens thereof and bind their rights,

> and are to be treated to all intents and purposes as the true and real boundary. * * * It is a right equally applying to the states of the Union, unless it has been surrendered under the Constitution of the United States." And he decides that it has not been so surrendered.

Thus, indeed, this case, instead of being decided upon the ground of acquiescences, or of prescription, is decided upon the ground that the boundary fixed by the commission was the true and ancient boundary between the states, and that the treaty would not be disturbed now.

On the other hand, we have a Decision in

Belding v. *Hebard,* 103 Fed. Reporter, 533.

It is held that a boundary once having been established between two states by joint commission, that boundary could not be changed by the action of state authorities in the recognition of any other line, unless it would create a mutual estoppel, and he states what would not create such an estoppel.

This decision will be considered further in this brief, at the proper subdivision of the argument.

We thus see that there is nothing in the decisions of the United States Supreme Court on the question of international law which asserts the doctrine of prescription as giving title between nations. On the other hand, time is used alone as an ingredient of proof in conformity with the rule laid down in the Passamaquolly Bay controversy.

But leaving these Decisions for the present, and coming to the last Boundary Commission between

The United States and Great Britain,

involving the question of the Alaskan boundary, and

being the last utterance of an international court upon the subject, whatever was determined there must be of great weight, and in fact necessarily conclusive upon the question. The reports of this boundary controversy cover some seven volumes. The case was argued before the Commission by Sir Robert Finey, Mr. David T. Watson, Dr. Christopher Robinson, Mr. Hannis Taylor, Sir Edward Carson, and Mr. Jacob M. Dickinson. The facts in the case show conclusively that Russia had held possession up to the boundary claimed by the United States prior to the purchase of the United States in 1867 and extending back to the treaty of 1825 between Great Britain and the United States; and that the United States after her purchase maintained jurisdiction through legislative acts of Congress, her war. and navy department, and subsequently under her civil jurisdiction constantly thereafter to the boundary line occupied by Russia under the treaty of 1825.

On the other hand, that England exercised no jurisdiction during all of this time and acquiesced in the jurisdiction exercised by Russia and by the United States, claimed by the United States 73 years and admitted by Britain 63 years, Britain claiming that ten years prior to the claim of notification to the United States that she had claimed the title to a part of the property in controversy.

The kind of possession shown by the United States was actual possession in the sense of legislation by Acts of Congress; of securing the allegiance of the native tribes within the territory; of executing men for crimes within the territory in question; and va-

rious other acts, chief among which was claiming by her maps the boundary contended for. On the other hand, it was admitted that all of the maps of Britain, official and otherwise recognized the same boundary as that contended for by the United States; that the lease of the Hudson Bay Company of the property in question by Russia was called to the attention of Parliament, and that Russia did not have jurisdiction to make the lease.

Under this state of facts, certainly it would seem that if acquiescence and prescription were a part of the law of nations it would have been contended for by the United States in this controversy as settling the question.

It is proper here to state that the matter submitted for the consideration of the tribunal was to ascertain the true boundary under the treaty between Great Britain and Russia; and probably therefore the question of prescription and acquiescence was actually excluded from the consideration of the court; but that does not do away with the position taken by America and taken with British authorities, and admitted by the court during the argument.

In the written argument of the United States, beginning at page 201, the United States urges:

> "It is respectfully submitted that it has been conclusively shown that for over seventy years before the present claim of Great Britain was preferred, Russia and the United States exercised jurisdiction over the waters and coasts in dispute; that throughout that period Great Britain never tried in any way to assert any sovereignty over any part of them, and that by her official maps she concurred in the claims made notoriously

and continuously by the official maps of Russia and the United States, and that the boundary line in dispute ran from the head of Portland Canal around the heads of all the bays and inlets."

The argument then quotes the argument of *Indiana* v. *Kentucky,* Supr. 136 U. S. Reports, beginning with that part of the decision which says it was over seventy years after Indiana became a state, etc. The argument also quotes at length from the Agent of Great Britain concluding his argument in the Passamaquoddy Bay controversy, which has been quoted above in this brief in part; and the United States' argument concludes with the following:

"The right of Great Britain to the territory in question was as perfect and complete as it could ever be from the moment the Treaty of 1825 with Russia was executed. If from that time down to '98 she failed to assert the right now set out, and acquiesced in the exercise of dominion and jurisdiction upon the part of Russia and the United States, *such acquiescence should be conclusive as to her understanding of the Treaty of* 1825."

The argument there being, that possession and acquiescence could only extend to and be evidence of the meaning of the treaty or the understanding thereof by both parties at the time it was executed, and extended no further.

At page 345 of Vol. 6 of the Alaskan Boundary dispute, Sir Robert Finley states as follows:

"Now I submit as a proposition of international law that possession and even long possession as between nations would not of itself confer a title. I mean if a territory is admittedly the territory of A however long B had been in possession, A would be entitled to turn him out and

to assert jurisdiction. I am speaking of two nations as A and B; but if there was a dispute as to whose territory was the long possession would be a most material element in endeavorng to determine which of the parties to the dispute was in the right; and it is from that point of view and from that point of view only that I submit possession can be looked at. There is no rule in international law which corresponds to the statutes of limitations. What we have in international law is that if the right to the territory is in dispute, then long possession is a matter to which the tribunal which is to determine that dispute may very properly have regard."

But he states, going on:

"A consideration of that kind is excluded in the question before the tribunal."

He then goes on:

"I would say, first, that there is no statute of limitations between nations which bars a right otherwise good. Second, in the absence of special stipulations where it is a question of disputed territory, you may very properly have regard to the fact of long possession; but, thirdly, in the present case all such considerations are put out of view by the language of the treaty. You can look at those facts only so far as they tend to show the effective understanding of the parties with regard to it."

Whereupon the President of the Commission, who was Baron Alverstone, Lord Chief Justice of England, stated, at page 346:

"Perhaps it might be convenient, and I just mention it at present. * * * I think you have put it quite correctly, Mr. Anthony; but Lord Hannon, in the Bering Sea Arbitration expressed a clear opinion in the course of the Arbitration, that prescription properly so-called, found no place as between nations."

"Sir Robert Finley: No.

"The President: But he did point out that estoppel and acquiescence be important features.

"Sir Robert Finley: Yes.

"The President: And then further, I think it appears in the course of the argument that he thought prescription had no application where the question was the construction of a bargain or contract between two parties. I only mention that because I believe you have stated the law, if I may say so with respect in concurrence with Lord Hannon and the view there laid down."

From this we see the opinion of the attorney for England, and also of the president of the tribunal, who was the lord chief justice of England and who certainly, in view of the position he was occupying at this time, must have thoroughly investigated the matter.

But now let us come to the contention of the United States, at page 618, Vol. 7. Mr. Hannis Taylor, in concluding his argument for the United States, states, at page 319:

"But the difficulty which beset prescription at the outset has beset it all through its history, and that is, that as there was no common law-maker among nations nobody could fix the time that a prescription should last as a statute of limitations. Publicists could say fifty years ought to be long enough to make a prescription, but as there was no common sovereign of all the nations who could legislate and fix it, prescription was always a vague and ineffective doctrine of international law, because nobody could define the length of time that it had to last."

He then states:

"So in that condition of things the publicists of the world removed the difficulty by a very

wise expedient: They built up alongside of prescription a new doctrine which they called acquiescence. The great cardinal characteristic of acquiescence is that it does not require any particular length of time to perfect it. It depends in each particular case upon all the circumstances of the case. *The primary value of acquiescence is its value as a means of interpretation.*"

He then quotes in his oral argument the decision of *Indiana* v. *Kentucky*, and the argument of the Agent of Great Britain in the Passamaquoddy Bay controversy, and concludes:

"I claim that there is no rule in the whole range of international law; no one upon which the peace of nations depends; no one upon which the security of system depends, which demands such strict enforcement at the hands of an international tribunal as the one which directs it to *construe treaty by the act of the parties emphasized through their acquiescence.*"

Judge Dickinson, in his argument for the United States, states, after stating the kind of possession, in an extract from the Argument in behalf of Great Britain in the proceedings of the Commission, in Article I' of the Treaty of Ghent relating to title in the island of Passamaquoddy Bay:

"*I do not read this for the purpose of suggesting that there could be any acquiescence operating as an estoppel;* it can be looked to as an evidence of the interpretation put upon the matter by the parties. The position assumed in the argument of the case by the counsel for Great Britain which I quote is entirely sound. It is exactly the position in which we place ourselves in this case in regard to what we have styled acquiescence."

He then quotes that part of Passamaquoddy Bay argument which I have quoted above, and says:

> "Here are the emphatic words most strongly evincing the sense of both nations at that time with regard to the right to these islands under that treaty, and can be construed in no other *light than as a mutual contemporary exposition of the true intent of the treaty in that regard.*"

And at page 924:

> "I say that the possession of the United States of all that territory throughout that time without any quesion on the part of Great Britain was an inerpretation put by Great Britain upon the Treaty of 1825, and that under the terms of this treaty under which you are acting, those acts ought to be looked to by this Tribunal, and that there is nothing in this case that should have greater weight in controlling your judgment upon the question of *interpretation.*"

Before closing the discussion of this part of the brief, we desire to quote from Chancellor Kent, as follows:

> "The sole source of the law referring to international law, the fountain from which it flows, whether in its customary conventional or judicial customary *shape* is the consent of nations."
>
> Kent's Com. Int. Law, page 4.

We also desire to quote Bentham, as follows:

> "Natural right is often employed in a sense opposed to law. * * * We cannot reason with fanatics armed with a natural right which each one understands as he pleases. * * * Which is inflexible at the same time that it is unintelligible, which is consecrated in his eyes like a dogma, and which he cannot discard without a cry. Instead of examining laws by their results, instead of judging them to be good or bad, they consider

them with regard to their relation to the so-called natural right. That is to say, they substitute for the reason of experience all the chimeras of their own imagination."

Another great thinker who has probably influenced the course of law as much as any other man excepting alone Bentham, Austin, in his Principles of Jurisdiction Determined, Vol. 1, page 222, says:

"Grotius, Puffendorf and other writers on the so-called Law of Nations, have fallen into a similar confusion of ideas. * * * They have confounded positive international morality or the rules which obtained amongst civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it ought to be, with that indeterminate something which they conceived it would be if it conformed to that indeterminate something which they called 'the law of nature.' Professor Von Martens of Gottingen, who died only a few years ago, is actually the first of the writers on the law of nations who has seized this distinction with a firm grasp. The first who has distinguished the rules which ought to be received in the intercourse of nations or which ought to be received if they conformed to an assumed standard of whatever time from those which are so received, endeavored to collect from the practice of civilized communities, what are the rules actually recognized and acted upon by them, and give to these rules the name of Positive International Law."

I have now followed the doctrine of prescription from the beginning to its conclusion with an immense amount of labor, considering the short time I had at my disposal. I have examined every authority upon which I could lay my hands, for the purpose of ascertaining the real and true rule of international law

with regard to this subject. To reiterate here, I lay down as a proposition that cannot be disputed,

FIRST,—

There is no such doctrine in international law applying to the acquisition of territory as usucaption and prescription; that there is no such thing in international law as a statute of limitations or anything in the nature of it.

SECOND,—

That in international law there is a doctrine of acquiescence, properly understood, which is simply used as a means of interpreting treaties between nations, and has no effect whatever by reason of lapse of time, otherwise than proving the intentions of the parties.

Having thus shown that prescription does not apply, before proceeding to the argument with regard to whether there has been possession on the part of Arkansas and acquiescence upon the part of Mississippi, it may be well to state here, that it is admitted that there has never been any boundary commission or treaty on the part of the State of Arkansas and the State of Mississippi seeking to ascertain their boundaries; that each has merely claimed the territory to the extent of its limits, authorized by Congress; and that the only question to be determined in this case is, where the true boundary was, which is a question of fact, *i. e.*, where was the channel of the Mississippi River and the Respondents' contention that it was *to be* West of Island 76, is established by all of the

evidence, thus placing the property within the jurisdiction of Mississippi.

(a) Arkansas, under the Federal Constitution, did not have power to acquire and hold territory beyond the boundary defined by the Act of Congress admitting it into the Union, without the consent of Congress, or as an evidential aid of the true and ancient boundary.

Sect. 3, Article IV of the Constitution of the United States, is as follows:

> "New states may be admitted by the Congress into this Union, but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states or parts of states, without the consent of the Legislatures of the states concerned, as well as Congress."

Sect. 10, Article I of the Constitution of the United States:

> "No state shall without the consent of Congress * * * enter into an agreement or compact with another state or with a foreign power."

In construing Section 3, Article IV of the Constitution, we are practically compelled to do so without the assistance or guide of any prior constructions to aid us, at least upon the particular point to which we now make reference. We must therefore examine the words themselves to ascertain what is meant by the Constitution.—The inhibition is very positive; no new state shall be formed or erected within the jurisdiction of another state; nor shall any state be formed by the junction of two states or parts of states. Wherefore it follows that any boundary of a new state established, adjoining one already admitted into the

Union, cannot extend beyond the boundary of the old state; and that, after the Act of Congress admitting it, the new state itself cannot extend its territory into the older state, except by consent of the Legislatures of the two states and of Congress.

These propositions seem perfectly clear, and if they are clear, the thread of analogy being spun, it is easy to follow it:

Mississippi was admitted into the Union in 1817 with her boundary fixed and determined as the middle of the main channel of the Mississippi River and as the Complainants contend or at the low water mark of the main channel of the Mississippi River,—either of which constructions place Island 76 within the territory of Mississippi provided the channel of the Mississippi River ran west of Island 76 at that date. This fact we believe has been established by record evidence beyond the shadow of a doubt. In fact, the only evidence in the case which can be considered evidence so-called establishes the channel west of the island; and therefore we assert that the boundary of Mississippi in 1817 included within the territorial limits of that state Island 76. Not only is this the fact, but Mississippi claimed the island as a part of her territory and the maps of that state included it within her bounds.

> See Field Notes and Map of 1830, wherein the island is sectionized as a part of Township 21, Range 8 West in Mississippi.

Arkansas was admitted into the Union in 1836. It must be presumed that Congress had notice of the territorial limits of the State of Mississippi and did not

intend to violate the above Section of the Constitution of the United States by attempting to place within the territorial limits of Arkansas any part of the territory of the State of Mississippi; and in addition to Congress having notice of that fact, Arkansas itself had notice of the boundaries of Mississippi by reason of its claim to Island 76 held out to all the world by the maps of the State in its land offices at Jackson.

Therefore: Since at the date of the admission of Arkansas, Island 76 was a part of the State of Mississippi it became impossible for Arkansas to have acquired Island 76 or have extended its jurisdiction into the boundaries of Mississippi without the express consent of its own Legislature as well as the Legislature of the State of Mississippi. And under this Section of the Constitution the only means whereby it could have acquired territory within the State of Mississippi was by Act of Legislature of both States approved and consented to by the Congress of the United States.

This was not done, and therefore Arkansas did not acquire any rights to Island 76 at the date of its admission into the Union. The question then arises,—Has she acquired any claim since, or could she acquire any? In no way does she assert, or even is it pretended, that she has asserted claim to Island 76 prior to 1846,—29 years after the boundaries of Mississippi were established, and 16 years after Island 76 had been sectionized as within the boundaries of Mississippi, and 10 years after the admission of Arkansas, and then the only claim to the Island is by reason of a survey made by Mr. Pellum at that date. No Act of the Legislature of Mississippi refer to the Island—;

and yet, under the Constitution of the United States, it is requisite before a State can acquire property in another State, that it shall be done by and with the consent of the Legislatures of the two States consented to by Congress,—a constitutional provision which cannot be violated directly,—cannot be violated indirectly.

If, in 1836, Arkansas had no title to Island 76, by reason of its being within the boundaries of the State of Mississippi, it could not have acquired title except by Act of the Legislatures and approval of Congress at that date. If that was the case at the time,—Arkansas cannot now claim title to the Island, by reason of claim to possession for a time,—for time can have no effect in procuring a necessary prerequisite to the acquisition of property. Time, alone, will not justify, will not justify doing away with a constitutional provision,—and it is necessary for Arkansas to show to-day an Act of the Legislature, and an Act of the Legislature of Mississippi, granting her the territory claimed within the limits of the State of Mississippi, as it would have been at the date of her admission into the Union.

Indeed, under the two Clauses of the Constitution above quoted, it is doubtful if a State can extend its jurisdiction beyond the boundaries designated by Congress, without the consent of Congress,—whether it extends its boundaries into another State or not. The only means whereby it could do so, would be by the consent of Congress, for Congress has only authorized it to act as a State within the limits defined by the Act; —and as a State is positively prohibited from entering into a treaty with a foreign power,—or into a compact

or agreement with another State, except with the consent of Congress,—there is no method whereby it could acquire any additional territory. It is possible the consent of Congress might be presumed, if it could be shown the matter had been brought to its attention.

(b) That the claim of the doctrine of Usucaption and Prescription short of immemorial prescription, cannot apply between two States, except where there has been a boundary commission of the States whose boundaries are to be affected, held by, and with the consent of Congress,—or as evidential aid of the true and ancient boundaries.

We have shown in the foregoing argument that usucaption and prescription is not a law of Nations, except as to immemorial prescription, and except as an aid to the interpretation of treaties affecting boundaries between nations. As within the states of the United States immemorial prescription is not possible, the only other application that the pretended rule would have, would be to aid to interpret a boundary commission, or as an aid to discover where the true and ancient boundary existed. If we take the above clauses of the Constitution, with the interpretation upon them for which we contend as correct, to apply, or attempt applying, prescription as a means of a State acquiring additional territory within the boundaries of another State, it would violate the terms of the Constitution itself, reading therein the now ingredient of time, and permitting a State to do indirectly that which was prohibited to it directly.

And therefore—, Unless the consent of the Legislatures of the two States, and either the direct, or the

implied consent of Congress can be shown at this date, Arkansas can have no claim to Island 76—, Act of the Legislatures of the States being essential to establish this title at this date, as it would have been to establish it at any date prior thereto.

(C) Arkansas never had such possession of Island 76, or exercised such jurisdiction over the territory of said Island, as to warrant the invoking of the pretended doctrine of usucaption.

(D) Mississippi never relinquished or abandoned its possession so that the so-called doctrine of prescription could be invoked against her. But, on the contrary, she held possession of said Island from 1817 to the present day; and Arkansas has not claimed possession for a sufficient length of time to obtain title under the pretended action of usucaption and prescription.

The above proposition may best be considered together, and involve chiefly a consideration of the facts as established by the record in the case:—

FIRST.

As to the Possession of Mississippi.

In 1817 Mississippi was admitted into the Union. At that date her rights to her territory became fixed under the Act of Congress admitting her into the Union. From that date until 1830 there was no positive act on the part of Mississippi showing whether or not she claimed possession of Island 76 in the Mississippi River as a part of her territory, by reference

to said Island by name, except her claims of all territory within the limits granted to her by Congress. In fact, at no time has the State of Mississippi made any special legislative act in which Island 76 was particularly mentioned as being within her bounds. But in 1830 the United States Surveyors in platting the territory of Mississippi, platted Island 76 as a part of Township 21, Range 8 West, in Bolivar County—, Sections 36 and 37 of said Township and Range. The field notes of said Plat were sent to the proper departments, and a map was made showing that Mississippi claimed at that date Island 76 to be within her boundaries, and exercised such possession and control over it as she exercised over land in any other part of the State. She maintained therefore this possession without any question on the part of any one for the space of 29 years, that is— from 1817 to 1846— and there is no proof whatever that she has ever abandoned or released, or sought to release her possession. In 1846, Mr. Pellum surveyed the lands in Arkansas for the United States Government, surveying Island 76 as a part of the State of Arkansas; but it must be remembered that this was Ten (10) years after the State of Arkansas had been admitted into the Union— during all of which time Mississippi held possession of Island 76, and exercised jurisdiction thereover. It must also be remembered that in 1827 McRee made a plat of Arkansas opposite this Island— said plat dated December 23rd, 1829, just prior to maps of 1830 of Mississippi— and did not include the Island as Arkansas territory, viz.—That at about the same date, the one State claimed the Island, and the other, then a terri-

tory, did not. Subsequent to Mr. Pellum's survey of this Island as a part of Arkansas, Mississippi, in 1852, applied for the lands as swamp lands under the Swamp Land Grants; and under this Act, the land was approved to the State as all other lands in the patent were approved of, and Mississippi by reason of the approval considered that the land had been given to her by the Swamp Land Grant by the United States. Subsequently, and in 1854, Mississippi patents the land to Mr. W. G. Ford.

We then see that from 1817 to 1854 Mississippi claimed title to Island 76 as within her territory unquestionably, and without any notice or idea of supposition that there was any claim or right upon the part of any one else to said property. From 1830 to 1854 a period of 24 years, she held possession, holding out to the world that she maintained her possession of said property by reason of her maps, showing the Island to be distinctly a part of Mississippi. Subsequently, and in 1855, the Governor of Mississippi is informed by private letter that Arkansas has some claim to the Island. Immediately the Governor, and in 1855, takes up the matter with the Department of the Interior at Washington, and continues with them the correspondence until 1859. The matter seems to be left in abeyance at this date the general opinion of all being that the property is a part of Mississippi, and not a part of Arkansas. There is nothing to show any acquiescence upon the part of Mississippi to the claim of Arkansas, nor in fact, is there any claim of Arkansas to said property except by reason of the Pellum survey, which sectionized the Island as a part of Ar-

kansas— that is, there is no affirmative act of the Executive and Legislative branches showing a claim of Arkansas to this land— but Mississippi had claimed since 1830, under the Benjamin Griffin survey.

Subsequently to this, and in the '60s, the unpleasantness which resulted in one of the greatest conflicts of arm known in history came about,—lasting until 1865,— during which time every controversy was in abeyance, and the business of war was alone attended to. And thereafter, and extending up to 1876, and later, "carpet-bag" rule prevailed—,the State being engaged in a political freedom. Subsequent to that, Mississippi appears to have taken no action in regard to the matter except by Acts of her Legislatures to maintain the full extent of her boundary, and to continue to hold the property as a part of her territory, maintaining its boundaries by designation, by plats, etc., within her Land Offices. It appears, however, that there is no proof of the Assessor of Washington County, or of Bolivar County, having assessed the land as part of the territory of the State; and in 1881— that is— within five years after the war with the 'carpet-baggers'—, this error is discovered, and by special Act of the Board of Supervisors of Bolivar County, the property is placed upon the assessment roll, and the statement is made, that in error the Assessor has heretofore failed to assess it. From that time on until the beginning of this suit, and since, Mississippi has continued to tax the Island as a part of her territory, has disposed of it to purchasers, and has maintained her maps and plats, showing that she continues to hold the property as a part of her territory. Indeed, within this

latter time, and in 1892, some 11 years after Mississippi has been taxing the property, certain ministerial officers of the State refunded the money on the *ex parte* application to purchasers who had purchased the property from the State of Mississippi, stating as a reason thereof, that the Island is within the jurisdiction of Arkansas. This last act will be discussed under the proper head, but can have no bearing whatever upon the question of the exercise of the possession of the State of Mississippi, or upon its claims to the territory, or upon the question of the acquiescence of the State in the claim of Arkansas for any length of time.

Now, then, let us see what Arkansas has done with regard to possession.

Arkansas was admitted to the Union in 1836. At that time as stated, Mississippi was holding the posses sion of the Island claiming it as a part of her territory, the McRee survey still on file had not placed the island in Arkansas and at the date of the admission of the latter state her maps and plats showed that her boundaries did not extend to or include Island 76; and Arkansas made no claim whatever to the property from 1836 to 1846—10 years after the admission of Arkansas into the Union as a state. In 1846, Mr. Pelham, finding that at that date the channel of the Mississippi runs east of Island 76, without investigation, or inquiry to ascertain whether the island had been platted before or was claimed as a part of Mississippi, proceeds to plat the island as a part of Arkansas; and this act of Mr. Pelham in 1846 is the inital act upon which the appellants claim that Arkansas has possession and exercises jurisdiction over Island 76. The legislature

of Arkansas takes no notice whatever of the island; nor does any officer of the state except in 1854 to apply for the land under the swamp land grant, just as Mississippi had applied for it in 1852. The only act on the part of Arkansas shown with regard to possession not shown by the state of Mississippi, is that from 1865 to 1881 Arkansas assessed taxes on Island 76, during the time that it is not shown that Mississippi did so. With this exception and the exception of her tax sales, which likewise took place in Mississippi, Arkansas has done absolutely nothing by which she is shown to have exercised jurisdiction over Island 76: Her legislature has not referred to it; her courts have not executed writs upon the island; her executive officers have not referred to the island as a part of the state; nor has she taken any special measures with regard thereto in any way different from those taken by the state of Mississippi. In fact the island has practically been uninhabited except for some occasional squatter during all the time until recent years; and indeed, now it is uninhabited except for some one probably lighting the United States Government light, or now and then in possession for the owners of the property.

Does this give any such possession, and do these facts give any such acquiescence on the part of Mississippi that can in any way be said to justify, under the laws as applicable to private individuals even the principle of prescription? It will be remembered that the Roman law, which was said to be applied to nations without a designated term of years, that an uninterrupted possession, or an uninterrupted acquiescence on the part of the other was necessary; and thus it

was that when Carthage claimed title against the Numidians, the reply was, "that sometimes one king held title and sometimes another, he who was the strongest holding the property." So it would seem in this instance that from 1817 to 1846 Mississippi held possession unquestioningly. No proof whatever of her relinquishing possession is shown, but from 1846 to the present time Arkansas has claimed and asserted jurisdiction and so likewise has Mississippi. In 1881 Mississippi likewise taxes the island and if we take from 1855, when Mississippi learns of the claim of Arkansis, to 1881 when she begins to tax, as acquiescence on her part, we find that only 26 years has elapsed—not long enough to give title at civil law even as between individuals in the case of usucaption and during which time Mississippi was asserting her title and in correspondence with the Interior Department, followed by the war. But it is idle to assert that any such possession on the part of Arkansas as is shown in this case can be urged as a prescription. The payment of taxes on the part of an individual attempting to establish it, is never allowed to show possession; nor can the assessment of taxes alone be shown as a claim to title or possession upon the part of the state. In the case of Massachusetts against Rhode Island actual possession and settlement was shown, the laws were executed, acts of legislature referred to the property in question, and the maintenance of the boundary to the lands in question. On the other hand Rhode Island likewise consented to the boundary as fixed for a large number of years, not attempting to exercise her jurisdiction beyond the line agreed upon by the Commission.

In *Indiana* v. *Kentucky* the State of Kentucky exercised its jurisdiction through its courts, by executing its processes, by assessment, by voting by its citizens, bringing suit within the U. S. Circuit Courts and State Circuit Courts, the property being determined by all of these courts to be within the jurisdiction of Kentucky. On the other hand, Indiana had never platted the property, had never claimed it as a part of her territory or exercised any possession of it or any control for over 70 years. * * * In *Missouri* v. *Kentucky* identically the same state of facts exist, with regard to the exercise of jurisdiction and possession by one State and the lack of exercise of jurisdiction and possession by the other. In the case of the boundary between Alaska and Great Britain the United States Government legislated with regard to the territory, executed its writs, demanded the allegiance of its inhabitants, maintained the line by its maps and executed criminals within the territory, and other acts showing that it maintained and held possession. Britain on the other hand admitted by its maps that the property was not claimed as a part of its jurisdiction and exercised in no way jurisdiction or possession over the territory.

Thus indeed in every case we find that it is essential that there should be some legislative act with regard to the claim of territory, some act connecting the sovereignty of the state with regard to its boundaries. It is only under the Constitution through the Acts of the Legislature that boundaries can be extended; and therefore it is only by the act of the Legislature itself that any claim of possession extending beyond its old

boundaries could give the state a claimed possession of property. Indeed, this matter is actually settled by the statement made in the foregoing part of this brief, where Mr. Upshur in writing to Mr. Everett instructions with regard to a boundary conflict between the United States and Great Britain, that time alone, independent of legislative act can be of no force in a prescription, which necessarily and of itself settles the question of whether the possession that Arkansas has exercised is such a possession as can be used against Mississippi, and further settles the fact that no time can run against the State of Mississippi on possession of such a nature.

There are three ways in which time exercises influence upon property:

First,—by the Statute of Limitations,

Second, by prescriptions, and

Third, by presumption of grants.

It is not pretended and is denied that a statute of limitations can run against the state.

It has been shown that usucaption and prescription does not apply in the case of a nation and especially as between two states, certainly not that prescription known at the common law which had reference only to incorporial hereditaments, and which extended "time out of mind," or to the time when "the memory of man runneth not to the contrary" established in law as I Rich. the I, 1189 A. D. Blackstone states the reason why prescription as known at common law does not apply to land: It is, that lands being conveyed in grant, there are more definite ways of showing the

original conveyors without the necessity of presuming a grant. Thus prescription at common law does not apply, and certainly usucaption as known at the Roman law does not apply, because no definite date or time is fixed for the running of the prescription. Indeed, if such were the case, the statute of limitations would be applied to a nation or sovereign state.

The only other method is that of presuming a grant; but no grant can be presumed in this case as having existed in favor of Arkansas because if such a one had existed it must have been a legislative grant, which could easily have been established, that is, it being established that Island 76 in 1817 was a part of Mississippi there can be no grant presumed from Mississippi to Arkansas and there is no pretension of even a grant. But, apart from these questions, and even admitting that the doctrine of usucaption and prescription would apply as in the case between individuals, the state has not brought itself by such possession or length of time of possession and by such acquiescence on the part of Mississippi to establish the fact. The only possession that could be claimed by the State of Arkansas would run at the most from 1859 until the possession was disputed by the State of Mississippi in 1881, which would be 22 years, from which must be deducted the years of the war. There is no case shown in which a prescription of 22 years as regards to nations is even held as conclusive on a treaty or construction of a treaty.

In the case of *Massachusetts* v. *Rhode Island* the time was over 200 years; in the case of *Indiana* v. *Kentucky* over 70 years; in the case of *Missouri* v.

Kentucky over 70 years; in the case of *Virginia* v. *Tennessee* over 80 years. And so the time itself is not sufficient; for even should we admit that the possession should be considered as running from '46 to the date of the institution of this suit, it would be only something over 50 years, and the shortest condition for such a rule even by the publicists is 50 years. Grotius and others claiming that it should be not far under 100 years.

We therefore submit that even if we admit the possession of Arkansas, which is denied, and the acquiescence of Mississippi, which is denied, that there has not run a sufficient time to apply the doctrine.

One other suggestion, and then I am through with this part of the question: It is this:

That since there has been no boundary commission between the states, nor any treaty, acquiescence on the part of Mississippi cannot apply, because the only thing that acquiescence could apply to would be as to the question of the construction of the treaty, or the understanding of the parties at the time as to where the true boundary was. On the other hand, the Assessors' act of assessing the land as a part of Arkansas can have no effect upon the claim of possession of Arkansas, because it cannot be presumed that the Legislature of Arkansas ever intended to hold property beyond the boundaries defined by its Act of Admission, or within the territory of another state.

The whole question, then, resolves itself to the one of determining where the channel of the Mississippi River ran in 1817, and that must be determined from

the evidence of the case; and we have shown and the Court has found that the channel of the Mississippi River at that date ran west of Island 76, as we believe conclusively and beyond the shadow of a doubt.

4. *The Respondents deny that the act of an executive officer can transfer title to property within the territorial jurisdiction of a nation or state, or change or effect the boundary of said state.*

In considering this question it is well probably to consider first the nature of the act by which the state is sought to be bound, and what the result of admitting the state bound by the acts of its officers in this case would be.

Under the form of a monarchial government the power to bind the nation with regard to territory, as well as most other matters, rests in the king, and in him alone is generally vested the power of making treaties with regard to the extension of territory and otherwise, with other nations. But there is an essential distinction between the principle governing a monarchy and that governing a republic: In a monarchy the king is the state, "I am the State," said Louis XIV. In a democracy the people are the state, and from them emanates all power, and under the Constitution of the United States all powers not delegated to the United States, are reserved to the separate states or to the people; and under the Constitution of the United States the treaty-making power is vested in the president of the United States and in the Senate, and therefore, all treaties must be approved by the Senate of the United States. In other words, this treaty-making

power is a political power vested not in the judiciary, not in the executive, but in the executive and legislative combined, under the direct terms of the Constitution of the United States itself. In the case of the various states this power is prohibited by the Constitution of the United States to the states except by and with the consent of Congress, and the power vested with the state Constitutions themselves is vested in the political powers of the state, and can be exercised only with the approval of Congress. Under the Constitution of Mississippi (Sec. 3 and 4 Constitution Miss., 1890), the legilature is the branch of government to which alone is delegated the power to settle boundary disputes or acquire additional territory; and under the Constitution of the United States the legislature of Mississippi could only do this in the case of the consent of some other power, and by and with the consent of Congress.

Thus, then, the only power in the state authorized by law to change the boundaries of a state to release territory or to acquire territory, is the legislature of the state, and any official seeking to act upon these questions directly or indirectly, would be violating the Constitution of the State of Mississippi, and his acts, contrary to law, would certainly not be binding upon the State.

The acts of the following officers are relied upon to establish, first, the possession of Arkansas, and second, the acquiescence of Mississippi:

First,—the act of the Assessor of Desha County, Arkansas, in assessing the property of that state for taxation.

Second,—the act of the Assessor of Mississippi in failing for a limited time to assess the property as within the State of Mississippi.

Third, the act of the Attorney General, the Auditor and the Governor of the State in making the refund to Curry & Hull, under a Section of the Code authorizing refunds in certain instances.

First, with regard to the act of the Assessors. In the case of *Schooner Fame* v. *Mason,* Circuit Court U. S. Reports, 147, United States Judge Story, delivering the opinion of the Court:

> "This was a case of a libel for violating certain of the revenue laws, the act of elicit trading being proved to be in Passamaquoddy Bay, the principal question was, whether they were done within the territorial limits of the United States or within the British waters. It appeared in evidence that there had been a sort of conventional understanding between the American and British collectors at Passamaquoddy, as to what line they would deem the true boundary of their respective governments."

The Court in his decision fixed the midway line between the island belonging to Great Britain and United States as the boundary line; and at page 152 says:

> "As to the line agreed upon by the collectors, it cannot for a moment be admitted as of any validity; they were not public agents entrusted with such negotiations, and their acts are not to be construed as indicating the sense of either government."

In *The People* v. *Roberts,* 155 N. Y., 508, at page 413, the Court says:

> "Thus, the single question presented seems to be: Whether the determination of an assessing and taxing officer, that an assessment made for

> one particular year should be canceled for the reason that the property was not subject to assessment, is conclusive upon succeeding officers against assessments for subsequent years upon the same property or franchise. Officers upon whom the duty of making assessments for the purpose of taxation is imposed, are independent public officers, possessing no jurisdiction as agents of the State, and for whose acts the State is not liable; nor is the State responsible for any mistake or misfeasance by them in the performance of their duty. The State imposes upon such officers the duty to perform certain distinct and definite acts. * * * We think that there is no ground for holding that the action of a mere assessing officer can determine that property is exempt from assessment for one year, and precludes the State as to the taxes imposed in succeeding years and prevents their other officers from complying with the clear and plain requirements of the statute."

Thus it will be seen that even though the Assessors of Arkansas and Mississippi had gotten together and had determined that Island 76 was in Arkansas, it would not have been binding upon the State either of Mississippi or the State of Arkansas. The Assessor of Arkansas, if he assessed property beyond the bounds of the state was exceeding his duty, and his act was of no authority whatever and could in no way connect the State in its sovereignty with it.

See

Missouri v. *Kentucky,* 11 Wall., Supr.

On the other hand, if the Assessor of Mississippi failed to assess property within the bounds of the State of Mississippi, he was violating his duty, and the State is in no way precluded by his action. Under the Constitution of the State of Mississippi the

boundary can only be changed by legislative action and hence there is no authority on the part of assessors to change it, and, as they could not do so originally, they could not do so with the assistance of time.

Third,—with regard to the act of Auditor, the Governor and the Attorney General of the State of Mississippi: They were acting under a special Section of the Code, which authorizes them in certain instances to refund money upon failure of title of lands; but this is an Act of Code, and must be construed in conjunction with the Constitution of the State of Mississippi, as the State of Mississippi in its Constitution has precluded any of its officers from changing its boundaries, the act in question cannot be construed so as to give the State officers when making a refund, the power of determining where the boundary of the State of Mississippi is, and their act can have no effect or be binding upon the State. Now, if the act itself is so construed it then becomes contrary to the Constitution of the State of Mississippi and of the United States, and is of no effect. It is a well settled principle of law that the state cannot be precluded by the laches of its officers from asserting any right or claim, nor is the state bound by the errors and mistakes of its officers in making settlements in its behalf, nor by the mistake or misfeasance of a tax collector in failing to make assessment or in making a wrongful one, the error being subject to correction by the officers' successors.

26 Am. and Eng. Ency. of Law, page 480, and cases cited in the Note.

It is hardly necessary to further discuss the ques-

tion of this refund in view of the facts, nor to to show that it can change the boundaries of the state of Mississippi, the constitution of the state preventing the officers of the state from such jurisdiction, and delegating that right alone to the legislature of the state; and certainly, as the act itself cannot estop a state from setting up its claim to title, it cannot be used in the question of the acquiescence of the state, because it occurred in only '92, when it was absolutely prohibited by the constitution, so far as affected its boundaries; and as these officers could not directly have changed the boundaries of the state by an act of theirs, they cannot indirectly do so.

5. *The Land Department of the United States cannot change the boundary between two states by the mere ministerial act of offering the land for sale, erroneously as within one state or the other.*

It would seem only necessary to state this proposition. The boundaries of the states are fixed by Congress and in the case of Mississippi, Congress accepted the conveyance of this territory for the purpose of making a state. The Congress is inhibited from making a new state within the territory of another state, and no state can acquire territory in another state without the consent to the two legislatures and of Congress and yet the contention is that the act of the Land Department in merely offering at Helena this land for sale is a claim that this act takes the island out of the jurisdiction of the state of Mississippi and places it within the jurisdiction of Arkansas, in other words that the mere ministerial act of an officer of the Land Department could do that which Congress

could not do. An examination of the facts in the case shows clearly how the error occurred. Pelham, in re-surveying the land in Arkansas in 1846 found that the channel of the river at that time was east of the Island 76 and surveyed same, sectionized it as a part of Arkansas. Upon its reaching the Land Office, without examining the matter, they place the land upon the market. An examination of the records would have disclosed to them the fact that the island had already been surveyed as a part of Mississippi. It was evidently carelessness on their part, and yet the contention is that this oversight has the effect of changing the boundary of the state. (See the opinion to the contrary of the various land Commissioners filed in te record in the correspondence.) And indeed, the proposition is too clear for serious consideration.

6. *The sovereign right of taxation belonging to a state is not defeated by the Federal Government patenting land within its territorial jurisdiction to a citizen in the state or a foreign state.*

This is axiomatic.

So long as Island 76 belonged to the Federal Government it was not subject to taxation. Immediately that the title left the government, it became subject to taxation by the state within whose boundaries it was. The island passed from the general government by its patents and became subject to taxation either in Arkansas or Mississippi. The appellants contend in Arkansas, the appelles, in Mississippi. Both parties claiming a tax title under the different states. The island, being in Mississippi, is not subject to taxation or ownership in Arkansas and the title from

Arkansas to the complainants is void. The court is without jurisdiction to decide the question but the very decision of the Court below that it is without jurisdiction, holds void the title of the appellants.

The suggestion is made, or the inference held out, that Island 76 was assessed in 1881 by collusion and that there has been some improper collusion on the part of the appellees in this case. This is not true. There is nothing in the record even squinting at it and the assumption is gratuitous and without foundation.

There is though, in the entire argument of the complainants below, appellants here, a constant effort to muddy the waters with technical and specious argument and we cannot better close this brief than by quoting from the profound Bentham:

> "Let us guard against the employment of figures in matters of jurisprudence. Lawyers will borrow them and turn them in fictions, amidst which all light and common sense will disappear, then mists will arise amidst the darkness of which they will reap a harvest of false and pernicious consequences."

We therefore respectfully submit that upon the facts of the case and upon every legal principle, the case should be affirmed.

Respectfully submitted,

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